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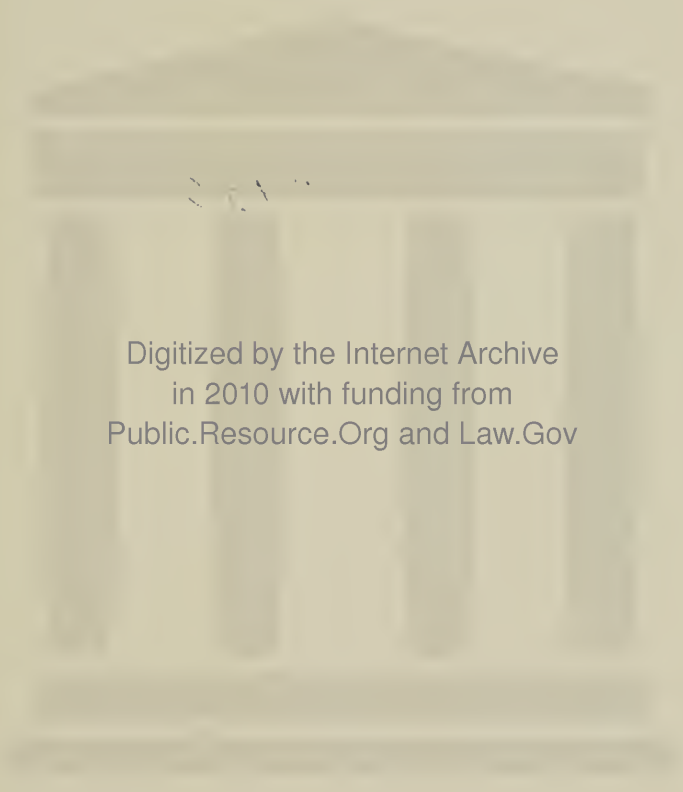
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No. 12916

United States
Court of Appeals
for the Ninth Circuit

THE TEXAS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

Petition to Review and Petition for Enforcement of Order of
The National Labor Relations Board

FILED

SEP 6 1951

Phillips & Van Orden Co., 870 Broadway Street, San Francisco, Calif.

PAUL P. O'BRIEN
CLERK

No. 12916

United States
Court of Appeals
for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to First Amended Consolidated Complaint (Exhibit No. 1-HH).....	9
Answer to Petition for Review and Request for Enforcement of an Order of the NLRB....	400
Certificate of the National Labor Relations Board	389
Charge, First Amended (Exhibit 1-E).....	3
Complaint, First Amended Consolidated (Exhibit 1-FF)	4
Decision and Order	31
Dissenting Opinion	54
Order	51
The Remedy	50
First Amended Charge filed Mar. 17, 1949 (Exhibit 1-E)	3
First Amended Consolidated Complaint (Exhibit 1-FF)	4
Intermediate Report and Recommended Order (Excerpts)	59
Conclusion of Law	75
Findings of Fact	64

Motion to Dismiss (Exhibit 1-II)	14
A—Charge filed Oct. 22, 1948.	19
C—Stipulation re Dismissal as to Defendant Oil Workers International Union, et al.	25
D—Affidavit of Wallace E. Avery.	27
Opinion, Dissenting	54
Petition for Review and to Set Aside a Decision and Order of the NLRB.	393
Statement of Points to be Relied Upon, Peti- tioner's (USCA)	406
Transcript of Proceedings.	76
Exhibits for General Counsel:	
1-E—First Amended Charge	3
Admitted in Evidence.	78
1-FF—First Amended Consolidated Com- plaint	4
Admitted in Evidence	78
1-HH—Answer to First Amended Consol- idated Complaint	9
Admitted in Evidence	78
1-II—Motion to Dismiss First Amended Consolidated Complaint	14
Admitted in Evidence.	78

Transcript of Proceedings—(Cont'd)

Exhibits for General Counsel—(Cont'd)

13 — Strike Settlement Agreement dated Nov. 4, 1948.....	79
18—Letter dated April 1, 1948, M. Halpern, Vice-President, The Texas Co. to George Cody	94
19—Picket Line Pass dated Sept. 6, 1948, to G. Cody	98
22—Excerpts from Constitution and By- laws of the Oil Workers International Union 1949—"Withdrawal Cards"..	112
23—Excerpt from Agreement between The Texas Co. and Union, May 9, 1947— "Seniority"	124
24—Excerpt from Agreement between The Texas Co. and Union, Nov. 4, 1948— "Promotions, Reduction of Forces, Seniority"	125
25—Letter dated Dec. 16, 1948, Geo. Cody to B. O'Connor, The Texas Co.....	160

Exhibits for Respondent:

14—Chart entitled "Operating and Main- tenance Organization Chart, Sept., 1948"	240
16 — Tabulation showing The Texas Co. Gathering Operations in the Los An- geles Basin District, Sept. 4-27, 1948.	251

Transcript of Proceedings—(Cont'd)

Exhibits for Respondent—(Cont'd)

17—Form entitled “The Texas Co. Run Ticket”	255
18—Form entitled “The Texas Co. Tank Strappings Report”	259
20A—Schedule Supervisors, Week 9/13-9/19	270
20B—Schedule Supervisors, Week 9/20-9/26	271
20C—Schedule Supervisors, Week 9/27-10/3	272
23—Excerpts from Black Book No. 1.....	302
24—Excerpts from Black Book No. 2.....	310

Witnesses:

Avery, Wallace E.

—direct	369
—cross	373

Bean, Herbert S.

—direct	228
—cross	232

Cody, Alfred George

—direct	90, 147
—cross	167
—redirect	209

Transcript of Proceedings—(Cont'd)

Witnesses—(Cont'd)

Cody, Alfred George—(Cont'd)

—recross 227

—recalled, direct 379

Dreyer, Elmer L.

—direct 237

—cross 332

—redirect 352

—recross 355

Jones, Fielder A.

—direct 357

—cross 366

Summerfelt, John B.

—direct 236

—cross 236

GENERAL COUNSEL EXHIBIT No. 1-E
NLRB-501
(12-48)

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER
First Amendment

Do Not Write in This Space

Case No.: 21-CA-375.

Date Filed: 3/17/49.

No. of Workers Employed: 1000.

Nature of Employer's Business: Producing-
Manufacturing and marketing Petroleum Products.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer against whom charge is brought: The Texas Company.

Address of Establishment: 929 So. Broadway,
Los Angeles, California.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) Subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge: The above Company by its Officers and Agents have violated Section 8 (a) 1 and 3 of the National Labor Relations Act by discriminating against me for allegedly refusing to perform work directed by them during the period of a strike between said Company and the Oil Workers International Union, C.I.O. Such discrimination included asking me to perform work of striking employees which was not normally performed by supervisory personnel, and by discriminatorily discharging me for alleged refusal to perform such work.

They further discriminated against me by refusal to reinstate me into a job covered by the collective bargaining Agreement after strike settlement, even though they had placed me back into the status of an employee as defined by the National Labor Relations Act, by requesting me to perform the duties and functions of employees covered by contract.

The above Company further discriminatorily refused to re-employ me in any capacity upon my making unconditional application for reinstatement on November 16, 1948, for any job from the labor classification upward; and have continuously refused, since that date, to re-employ me,

even though they have hired other persons into jobs for which I had made application who had never previously worked for the Texas Company in any capacity.

I, therefore, ask that the Board find that the Company must reinstate me, in accordance with the terms and provisions of the existing labor contract, and to be made whole for any loss of earnings suffered by me as a result of the acts of the Company.

(Signed) Geo. Cody

3. Full name of labor organization, including local name and number, or person filing charge; George Cody.
4. Address: 4120 Long Beach Blvd., Long Beach, California. Telephone No. 485-41.
5. Full name of national or international labor organization of which it is an affiliate or constituent unit: Oil Workers International Union—C.I.O.
6. Address of national or international, if any: 308 Brower Building, Bakersfield, California. Telephone No. Bakersfield 46-216.
7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By GEO. CODY

(Signature of representative or
person filing charge)

Date: 3-17-49.

[Stamped]: Received Mar. 17, 1949 NLRB

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80.)

GENERAL COUNSEL EXHIBIT No. 1-FF

United States of America

Before The National Labor Relations Board
Twenty-First Region

Case No. 21-CA-295

In the Matter of

THE TEXAS COMPANY

and

ROBERT R. RISSMAN

Case No. 21-CA-375

In the Matter of

THE TEXAS COMPANY

and

GEORGE CODY

FIRST AMENDED CONSOLIDATED
COMPLAINT

It having been charged by Robert R. Rissman, acting on behalf of fifty (50) individuals whose names appear on the attached charge in Case No. 21-CA-295, George Cody having filed the charges mentioned in the caption, and the General Counsel by appropriate Order having consolidated both charges, that The Texas Company, hereinafter called Respondent, has engaged in and is engaging in unfair labor practices affecting commerce as set forth

and defined in the National Labor Relations Act, as amended, Public Law 101—80th Congress, First Session, effective August 22, 1947, hereinafter called the Act; the General Counsel of the National Labor Relations Board by the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this First Amended Consolidated Complaint and alleges the following:

1. Respondent, a Delaware corporation with its headquarters in New York City, is engaged in the production, manufacture and distribution of petroleum products in various parts of the United States, including field and refining operations at and near Los Angeles and Ventura, California, which last mentioned operations are hereinafter referred to as the Plant. During the past calendar year at its Plant operations Respondent produced and refined petroleum and petroleum products of a value in excess of \$1,000,000, and during the same period of time in excess of fifty per cent (50%) of such products were transported by Respondent, or others on its behalf, to points outside the State of California. At all times material hereto Respondent has been engaged in and is engaged in operations at the Plant affecting commerce within the meaning of Section 2 (6) of the Act.

2. Oil workers International Union, Local 128, affiliated with the Congress of Industrial Organizations, hereinafter called the Union, is a labor organization within the meaning of Section 2 (5) of the Act.

3. On or about September 4, 1948, a substantial number of Respondent's employees at the Plant went on a strike called by the Union for the purpose of enforcing economic demands then being made by the Union as collective bargaining agent of such employees and the following named employees remained on strike until on or about October 6, 1948.

Abbiatti, F. W.	Milton, Joseph R.
Anderson, Joe L.	Montgomery, Robert W.
Buckmaster, H. E.	Moore, C. O.
Bullock, R. J.	Neal, Homer J.
Coonis, P. E.	Nyman, Theodore
Cullen, W. J.	Pence, H. W.
Davis, George, Jr.	Price, J. H.
Dees, C. H.	Redden, Thos. B.
DeGroodt, L. B.	Riddle, H. E.
Dorum, Anthony E.	Roberts, J. L.
Fessenden, Charles W.	Rubottom, Roger H.
Flippen, E. J.	Russell, John B.
Galloupe, W. H.	Summerfelt, John B.
Gothard, Elmer T.	Swift, John E.
Hartman, J. A.	Symons, R. D.
Jackson, H. H.	Thompson, L. B.
Ladd, Leroy H.	Townsend, D. B.
Lair, N. A.	Tracy, Lloyd D.
Leithead, Leland	Tracy, Lloyd E.
Lucas, H. B.	West, W. W.
Manion, Carl W.	Williams, Hannibal
Mashburn, W. D.	Williams, John A.
Mawson, W.	Wren, R. G.
McNamara, Edward	Young, J. W.
Melville, T. F.	

4. On or about October 6, 1948, and on various dates thereafter, well known to Respondent, the employees named in paragraph 3 above unconditionally offered to return to work and abandon the strike. On these dates, and at all times thereafter, Respondent, by its officers, agents and representatives, refused and failed to reinstate each and all of these employees because of their membership in and activities on behalf of the Union, and because they had gone on the afore-mentioned strike and engaged in concerted activities as adherents of the Union.

5. From on or about September 4 to November 1, 1948, Respondent, by its officers, agents and representatives, interfered with, restrained and coerced its striking employees by:

(a) Addressing to such striking employees direct, personal and repeated appeals and requests to abandon their strike and return to work, despite the fact well known to Respondent that the Union as the collective bargaining representative of the striking employees was continuing to prosecute such strike in connection with its bargaining demands.

(b) Individually urging striking members of the Union to return to work and accept Respondent's collective bargaining offers despite the fact, well known to Respondent, that the Union had rejected such offers as collective bargaining representative of the employees.

(c) Conditioning the return to work of strikers on the loss of their accumulated seniority earned as employees of Respondent.

6. By the acts, conduct and omissions set forth in

paragraphs 4 and 5 hereof the strike of Respondent's employees was prolonged and extended and converted from an economic strike into an unfair labor practice strike.

7. On or about November 16, 1948, and thereafter, George Cody was, on his application, refused employment by Respondent because of his concerted activities on behalf of the Union.

8. By the acts, conduct and omissions set forth in paragraphs 4 and 7 hereof, Respondent did discriminate and is now discriminating in regard to the hire, tenure, terms and conditions of employment of its employees to discourage membership in the Union and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

9. By the acts, conduct and omissions set forth in paragraphs 4, 5, 6 and 7 hereof Respondent has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed to them by Section 7 of the Act, and Respondent did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

10. The acts, conduct and omissions of Respondent set forth in paragraphs 4, 5, 6 and 7, occurring in connection with the business of Respondent as described above, have a close, intimate and substantial relationship to commerce as defined in Section 2 (6) of the Act, and have led, and tend to lead, to labor disputes burdening and obstructing commerce and

the free flow of commerce as defined in Section 2 (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 18th day of October, 1949, issues this First Amended Consolidated Complaint against The Texas Company.

/s/ HOWARD F. LeBARON,
Regional Director, National Labor Relations Board,
Twenty-First Region.

GENERAL COUNSEL EXHIBIT No. 1-HH

[Title of Board and Cause.]

ANSWER TO FIRST AMENDED
CONSOLIDATED COMPLAINT

Comes Now Respondent, The Texas Company, and withdraws its Answer to Consolidated Complaint filed on May 9, 1949, and for its Answer to the First Amended Consolidated Complaint herein:

I.

Admits the allegations of Paragraph 1.

II.

Admits the allegations of Paragraph 2.

III.

Admits that the employees named in Paragraph 3 went on strike on or about September 4, 1948, but denies that said employees ceased striking on or about October 6, 1948.

IV.

Except as hereinafter admitted, denies generally and specifically each and every, all and singular, the allegations of paragraph 4.

Avers that on October 8, 1948, John B. Summerfelt and C. O. Moore offered to return to work, that said offer was accepted by Respondent on that date, and that said John B. Summerfelt and C. O. Moore were scheduled to return to work, but that neither said John B. Summerfelt nor C. O. Moore returned to work as scheduled. Avers further than when said John B. Summerfelt and C. O. Moore next offered to return to work on October 13, 1948, all available jobs in the bargaining unit in which they had worked had been filled.

Avers further that, except as indicated herein above, the employees named in paragraph 3 offered to return to work on the dates specified below, at which times all available jobs had been filled.

Avers that the employees named in Paragraph 3 offered to return to work by letter dated November 1 and received by Respondent on November 3, 1948, except as indicated below:

Abbiatti, F. W., applied by letter dated November 3, 1948.

Coonis, P. E., applied by letter dated November 3 and received by Respondent November 6, 1948.

DeGroodt, L. B., applied by letter dated November 3 and received by Respondent November 5, 1948.

Lair, N. A., applied by letter dated November 3 and received by Respondent November 4, 1948.

Mashburn, W. D., applied by letter dated Novem-

ber 3 and received by Respondent November 8, 1948.

Pence, H. W., applied by letter dated November 3, 1948.

Price, J. H., applied by letter dated November 3 and received by Respondent November 4, 1948.

Riddle, H. E., applied by letter dated November 3 and received by Respondent November 8, 1948.

Swift, John E., applied by letter dated November 18 and received by Respondent November 23, 1948.

Williams, Hannibal, applied orally on November 5, 1948.

Williams, John A., applied orally on November 16, 1948.

Avers further that various of the employees named in Paragraph 3, from time to time have been offered and some have accepted temporary employment in Respondent's operations.

The following employees named in Paragraph 3 have been employed by Respondent in permanent positions and are now employed:

Buckmaster, H. E., employed on November 16, 1948.

Ladd, L. H., employed on November 16, 1948.

Melville, T. F., employed on November 23, 1948.

Roberts, J. L., employed on April 30, 1949.

Thompson, L. B., employed on March 14, 1949.

Wren, R. G., employed on November 19, 1948.

V.

Denies generally and specifically each and every, all and singular, the allegations of Paragraph 5.

VI.

Denies generally and specifically each and every, all and singular, the allegations of Paragraph 6.

VII.

Denies generally and specifically each and every, all and singular, the allegations of Paragraph 7. Avers that George Cody was discharged for cause on or about September 28, 1948, and for that reason only he was and is refused employment; that said George Cody was a supervisor as said term is defined in Section 2(11) of the National Labor Relations Act, as amended; and that because of the provisions of Section 2 (3) and the "for cause" provisions of Section 10(c) of said Act, the complaint as to said George Cody should be dismissed.

VIII.

Denies generally and specifically each and every, all and singular, the allegations of Paragraph 8.

IX.

Denies generally and specifically each and every, all and singular, the allegations of Paragraph 9.

X.

Denies generally and specifically each and every, all and singular, the allegations of Paragraph 10.

XI.

Alleges that the Complaint in this matter should be dismissed in its entirety because the matters in dispute upon which the allegations are based were settled by agreement between the Respondent and the Union and that the charge in Case No. 21-CA-239,

which was based upon the same events and contained substantially the same allegations as contained in the charges upon which this Complaint is based, was withdrawn by the Union on November 18, 1948, with prejudice, and said withdrawal was approved by the Acting Regional Director, Twenty-First Region, National Labor Relations Board, on November 19, 1948.

XII.

Notwithstanding all other allegations contained herein, Respondent moves that the Complaint be dismissed insofar as it relates to W. W. West named in Paragraph 3 thereof, because the name of said W. W. West does not appear in any of the charges upon which the Complaint is based.

Wherefore, Respondent prays that the First Amended Consolidated Complaint herein be dismissed.

J. A. McNAIR

CHARLES M. BROOKS and

WALLACE E. AVERY

/s/ By CHARLES M. BROOKS,

Attorneys for Respondent, The
Texas Company.

State of California,
County of Los Angeles—ss.

E. B. Liles, being sworn, says: That he is the Assistant Secretary of The Texas Company, a corporation, Respondent in the foregoing action, and is authorized to make this verification for and on behalf

of said corporation; that he has read the foregoing Answer to the First Amended Consolidated Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes them to be true.

/s/ E. B. LILES

Subscribed and sworn to before me this 21st day of October, 1949.

[Seal] /s/ ADA L. COLEMAN,

Notary Public in and for said County and State.

My Commission expires Sept. 30, 1951.

Affidavits of Service by Mail attached.

[Stamped]: Received Oct. 24, 1949 NLRB.

GENERAL COUNSEL EXHIBIT No. 1-II

[Title of Board and Cause.]

MOTION TO DISMISS

I.

The Texas Company, Respondent herein, moves the Trial Examiner to dismiss the First Amended Consolidated Complaint issued on the 18th day of October, 1949, in this matter, for the following reasons:

(A) Paragraphs 3, 4, 5, and 6 of said Complaint are based on charges and amended charges filed in Case No. 21-CA-295, which involve the same incidents and contain substantially the same allega-

tions as the charge in Case No. 21-CA-239, which was withdrawn with prejudice.

1. On October 22, 1948, the Oil Workers International Union, CIO, herein called the Union, filed unfair labor practice charges naming several companies, including The Texas Company, in Case No. 21-CA-239. The said charge is attached hereto as Appendix A. The aforesaid charge, like the one upon which the aforementioned paragraphs of the aforesaid Complaint are based, grew out of the strike of September 4, 1948, as described in Paragraph 3 of said Complaint. Many of the allegations in the former charge are the same or similar to those in the latter charge.

On November 18, 1948, J. Elro Brown, District Director of the Union, executed a request for withdrawal of the charge in Case No. 21-CA-239, with prejudice, insofar as it concerned The Texas Company. On November 19, 1948, Charles K. Hackler, Acting Regional Director, approved said withdrawal request. A copy thereof is attached hereto as Appendix B.

2. The charge in Case No. 21-CA-239 specifically refers to the "natural gasoline and laboratory," the "Los Angeles Basin production, drilling, and maintenance," and the "Ventura production" operations of The Texas Company. These are the same operations of Respondent which are referred to in the allegations of Paragraphs 3, 4, 5, and 6 of the aforesaid Complaint.

3. On or about September 23, 1948, Respondent

filed an Action for an injunction and damages in the Superior Court of the State of California, in and for the County of Los Angeles, against the Union and others. Said Action in the Superior Court was based upon acts and occurrences during the strike referred to in Paragraph 3 of the aforesaid Complaint.

4. In order to settle the disputes involved in the said Superior Court Action and in the charge in Case No. 21-CA-239, Respondent agreed to and did dismiss the said Action in the Superior Court in consideration of the Union's withdrawal of the charge in Case No. 21-CA-239. The stipulation providing for the dismissal of the Superior Court Action is attached hereto as Appendix C, and provides in the second paragraph thereof that "each and all of the parties have settled the dispute existing between them." Attached hereto as Appendix D is an affidavit by Wallace E. Avery, Attorney for Respondent, which describes in some detail the above-described settlement.

(B) Despite the above-described settlement and the withdrawal of the charge with prejudice, the Union has continued to press and is pressing the charge filed by one Robert R. Rissman in Case No. 21-CA-295, which constitutes the basis for the allegations of Paragraphs 3, 4, 5, and 6 of the aforesaid Complaint.

1. The Union appealed for review by the General Counsel of the National Labor Relations Board of

the partial dismissal by the Regional Director of the Twenty-First Region of the charge in Case No. 21-CA-295, although said charge was filed by one Robert R. Rissman. This appeal is a part of the record of the National Labor Relations Board and was signed by Charles F. Armin as International Representative of the Union and approved by J. Elro Brown as District Director of the Union. This is the same J. Elro Brown who signed the request for withdrawal of the charge in Case No. 21-CA-239.

2. The Union filed an Answer to Respondent's request for withdrawal of the complaint and dismissal of the charge in Case No. 21-CA-295. Said Answer is a part of the records of the National Labor Relations Board in this case.

The above statement are all based upon documents of record in this case. In view thereof, it is submitted that Paragraphs 3, 4, 5, and 6 of the First Amended Consolidated Complaint in this matter should be dismissed without further proceeding, because to prosecute the Respondent under said Complaint would violate the practices of the National Labor Relations Board regarding settlements between parties which are approved by the Board's agents, would contravene the spirit and policy of the National Labor Relations Act, as amended, and would be contrary to public policy.

II.

The Texas Company, Respondent herein, further moves the Trial Examiner to dismiss the First Amended Consolidated Complaint issued on the

18th day of October, 1949, in this matter, for the following further reasons:

(A) George Cody, the Complainant in Case No. 21-CA-375, the charge in which case is the basis for the allegations in Paragraph 7 of the aforesaid Complaint, was a Supervisor as defined in Section 2 (11) of the National Labor Relations Act, as amended, at the time he was discharged from the employ of Respondent on September 28, 1948, and is, therefore, excluded from the provisions of the Act because he is not an employee as defined in Section 2 (3) of said Act.

1. Paragraph 1 of the charge in Case No. 21-CA-375 admits that the said Cody was a Supervisor at the time of his last employment with Respondent.

2. The National Labor Relations Board may not issue an order directing the reinstatement or employment of any person who is not an employee within the meaning of the Act.

3. Therefore, since Cody is not an employee within the meaning of the Act because he occupied a supervisory job, the Board may not order the Respondent to reinstate or employ him.

(B) The charge in Case No. 21-CA-239, which was settled and withdrawn as described above, specifically referred to the alleged violation complained of in Paragraph 7 of the aforesaid Complaint in Paragraph (J) of the aforesaid charge.

In view of the statements in "A" above, all of which are based upon documents of record in this case, the National Labor Relations Board is pre-

cluded by the letter and the spirit of the National Labor Relations Act, as amended, from ordering Respondent to reinstate or employ the said George Cody mentioned in Paragraph 7 of the aforesaid Complaint. Moreover, because of the statements in "B" above, which are based upon documents of record in this case, the National Labor Relations Board is precluded for policy reasons from ordering Respondent to reinstate or employ said George Cody.

Wherefore, The Texas Company, Respondent herein, respectfully moves the Trial Examiner to dismiss the First Amended Consolidated Complaint in its entirety.

J. A. McNAIR

CHARLES M. BROOKS and
WALLACE E. AVERY

/s/ By CHARLES M. BROOKS,
Attorneys for Respondent, The
Texas Company.

APPENDIX "A"

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

1. Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that:

Name of Employer	Address	No. of Employees
Union Oil Company of California	617 W. 7th St. Los Angeles, Calif. 425 1st St. San Francisco, Calif.	2200

Name of Employer	Address	No. of Employees
Standard Oil Company of Calif.	605 W. Olympic Blvd., Los Angeles, Calif. 225 Bush St., San Francisco, Calif.	4400
Shell Oil Co., Inc.	1008 W. 6th St., Los Angeles, Calif. 100 Bush St., San Francisco, Calif.	2150
Lloyd Corporation, Ltd.	5410 Wilshire Blvd., Los Angeles, Calif.	40
Texas Company	929 S. Broadway, Los Angeles, Calif.	1300
Tide Water Associated Oil Co.	Pacific Electric Bldg., Los Angeles, Calif. 79 New Montgomery St., San Francisco, Calif.	3000
Richfield Oil Corporation	555 S. Flower St., Los Angeles, Calif.	1050
The Ohio Oil Company	437 S. Hill St., Los Angeles, Calif.	100

The above mentioned companies are engaged in the exploration, producing, refining, transporting and marketing of oil and oil products. Said companies have engaged and are engaging in unfair labor practices within the meaning of Section 8 (a) subsections (1) (3) and (5) of said Act, in that:

2. (A) Oil Workers International Union, and its locals 2, 5, 6, 19, 120, 128, 356, 445, 534, 547, 581 are and for some time past have been the duly certified collective bargaining agents of certain employees of the above mentioned companies in appropriate units known as:

Name of Employer	Collective Bargaining Unit
Union Oil Company of Calif.	Oleum and Wilmington Refineries Los Angeles Bulk Plant
Standard Oil Company of Calif.	El Segundo Refinery Richmond Refinery
Shell Oil Co., Inc.	Wilmington-Domingoes Refinery Martinez Refinery Pipe Line Field Dept., Production, Drilling and Natural Gasoline Guager Unit
Lloyd Corporation, Ltd. Texas Company	Production and Natural Gasoline Los Angeles Works and Terminal Los Angeles Package Terminal Pipe Line Division of the Pacific Coast Bargemen Los Angeles Works, Clerical Unit Los Angeles Package Terminal, Clerical Unit Natural Gasoline and Laboratory Los Angeles Basin Production, Drilling and Maintenance Filmore Works Ventural Production
Tide Water Associated Oil Company	Santa Fe Springs Clerical Watson Clerical So. California Pipe Line, San Joaquin Valley Pipe Line, and Watson Refinery Production and Drilling Manufacturing-Ventura Gas Department Bargemen Automotive Mechanics Avon Refinery Watson Laboratory
Richfield Oil Corporation	Production and Refining, Natural Gasoline, Harbor Terminals and Pipe Line
The Ohio Oil Co.	Production, Drilling and Natural Gasoline

(B) Since on or about September 3, 1948 the above mentioned companies, and each of them, by their officers, agents and employees have refused to bargain in good faith with the Oil Workers International Union, and its duly certified affiliated local unions.

(C) The above mentioned companies, by their officers, agents and employees have further refused to bargain on any term or condition of employment unless one of the other companies so bargain.

(D) Said companies by their officers, agents and employees have conspired to refuse to grant to the undersigned union any terms or conditions of employment, unless said term or condition of employment is granted by any of the other companies.

(E) Said companies, by their officers, agents and employees have further threatened employees that unless they cease their participation in the strike and return to work immediately, that they would be discharged.

(F) Said companies, by their officers, agents and employees have further threatened all employees with the loss of their insurance, pension and other rights and benefits unless they cease their participation in the strike.

(G) Said companies, by their officers, agents and employees further refused to bargain with the Union on the terms and conditions of a collective bargaining agreement unless the union terminated the strike.

(H) Said companies, by their officers, agents and employees, have refused and are now refusing to bargain with the undersigned union on the return to work of strikers.

(I) Said companies, by their officers, agents and employees have refused and are now refusing to bargain with the undersigned union on the companies announced intention of contracting work out to private contractors; such work has traditionally been performed by members of the undersigned union and the work is within the appropriate unit as established by the National Labor Relations Board.

(J) Said companies, by their officers, agents and employees, have discharged supervisors who have refused to cross picket lines, or who have expressed sympathy with and given support to the strike now being conducted by the undersigned union.

(K) By the acts set forth above said companies acting in concert have engaged in a course of conduct designed to and having the effect of interfering with the operation, function and activity of the undersigned union, for the purpose of destroying said union as the collective bargaining agent of their employees.

(L) By the acts set forth above and by other acts and conduct, the above-mentioned companies, their officers, agents and employees, did interfere with, restrain and coerce their employees in the exercise

of the rights guaranteed to them by the Labor Management Relations Act.

The undersigned further charges that said unfair practices are unfair labor practices affecting commerce within the meaning of said Act.

3. Each of the officers of the union has executed a non-communist affidavit as required by Section 9 (h) of the Act.

4. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9 (f), (g), and (h) of the Act.

5. Oil Workers International Union (CIO), 301 E. 5th St., Fort Worth, Texas. Telephone number 34441.

/s/ By O. A. KNIGHT
President

Subscribed and sworn to before me this 22 day of Oct. 1948, at Los Angeles as true to the best of deponent's knowledge, information and belief.

[Seal] /s/ GRACE V. SMITH,
Notary Public.

My Commission expires April 7th, 1951.

Case No. 21-CA-239.

Dated filed: 10-22-48. 9(f), (g), (h) cleared: 10-25-48. D.B.

APPENDIX "C"

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 550197

THE TEXAS COMPANY, a Delaware corporation,
Plaintiff,

vs.

OIL WORKERS INTERNATIONAL UNION, an
unincorporated association, affiliated with the
Congress of Industrial Organizations; et al.,
Defendants.

STIPULATION RE DISMISSAL AS TO DE-
FENDANTS OIL WORKERS INTERNA-
TIONAL UNION, et al.,

Whereas, the Complaint for injunction and for
damages was filed herein and a Temporary Restraining
Order issued on September 23, 1948, enjoining
and restraining certain activities as to the defend-
ants herein, and

Whereas, subsequent thereto each and all of the
parties have settled the dispute existing between
them,

Now, Therefore, It Is Hereby Stipulated between
plaintiff and defendants Oil Workers International
Union, Oil Workers International Union Long
Beach Local No. 128, Oil Workers International
Union Ventura Local No. 120, and all individual

defendants who are affiliated with or members of said unions who have heretofore appeared in the above entitled action, through their respective counsel who have been heretofore duly authorized, as follows:

1. That the above entitled action shall be dismissed as to all of said defendants without prejudice to any of the parties to this stipulation. Said dismissal further to be without damages or costs to either plaintiff or said defendants or any of them.

2. That plaintiff and the surety or sureties on its bond on Temporary Restraining Order in the sum of \$1,000.00 heretofore filed in the above entitled action shall be released from any damages or claims of any kind or character whatsoever arising out of the issuance or handling of the Temporary Restraining Order issued herein.

3. That the parties hereto mutually release each other from any and all claims for damages of any kind or character whatsoever that either may have against the other arising out of or connected with the above entitled action.

Dated: November 18, 1948.

J. A. McNAIR

WALLACE E. AVERY

GIBSON, DUNN & CRUTCHER

/s/ By GEORGE H. WHITNEY,

Attorneys for Plaintiff.

EDISES, TREUHAFT &
CONDON

ROBERT N. CONDON
LINDSAY P. WALDEN
LOUIS N. WOLF
A. L. WIRIN

/s/ By LINDSAY P. WALDEN,
Attorneys for defendants Oil Workers International
Union, an unincorporated association, et al.

It is so ordered.

Dated: November 19, 1948.

/s/ CLARENCE M. HANSON,
Judge of the Superior Court.

APPENDIX "D"

United States of America
Before The National Labor Relations Board
Twenty-First Region

[Causes Nos. 21-CA-295 - 21-CA-375.]

AFFIDAVIT OF WALLACE E. AVERY

State of California,
County of Los Angeles—ss.

Wallace E. Avery, being first duly sworn, deposes
and says:

That he is an attorney duly licensed to practice
law in the State of California, employed by The
Texas Company.

That on or about September 23, 1948, The Texas

Company filed an action for an injunction and damages in the Superior Court of the State of California, in and for the County of Los Angeles, against the Oil Workers International Union, CIO, and others; that a temporary restraining order and an order to show cause were issued by the Court, which were extended from time to time by stipulation of the parties.

That on or about October 22, 1948, an unfair labor practice charge was filed with the National Labor Relations Board, Twenty-First Region, by said Union against said Company and others, and that said charge was given Case No. 21-CA-239.

That from time to time prior to November 18, 1948, affiant and other Company representatives and representatives of said Union, including Lindsay P. Walden, General Counsel of said Union, negotiated with reference to a settlement of the Superior Court action and the unfair labor practice charges. That on November 18, 1948, J. Elro Brown, District Director of said Union, and said Lindsay P. Walden proposed to affiant to request the withdrawal with prejudice of the charges in Case No. 21-CA-239 if said Company would dismiss its action against said Union and others, including John Summerfelt, J. L. Roberts, C. O. Moore, and O. E. West. That upon said date affiant obtained the consent of officials of said Company to dismiss said action upon the condition that said Union would withdraw its charges in Case No. 21-CA-239 and would not file any further charges concerning anything arising out of the

strike. That with this understanding in mind, affiant and George H. Whitney, an attorney associated with the firm of Gibson, Dunn and Crutcher, drafted a stipulation dismissing said action, a photostat copy of which is attached hereto and a request that the charge in Case No. 21-CA-239 be withdrawn with prejudice. That on said date affiant and said George H. Whitney called upon J. Elro Brown and Lindsay P. Walden at the Alexandria Hotel in Los Angeles and presented said documents to them. That upon the assurance of J. Elro Brown and Lindsay P. Walden that said Union would not further harass the Company by filing or instigating the filing of any other unfair labor practice charges against said Company, because of anything arising out of the strike, said stipulation dismissing said Superior Court action was executed on behalf of the Company by George H. Whitney, and said withdrawal request was executed by said J. Elro Brown.

That on or about November 19, 1948, affiant called upon Charles K. Hackler, Acting Regional Director of the Twenty-First Region, who, in the presence of affiant and Daniel Harrington, attorney, National Labor Relations Board, Twenty-First Region, telephoned J. Elro Brown and inquired of him whether the differences between the Company and the Union had been settled and whether the withdrawal request was to apply to all charges and all operations. That Mr. Hackler, upon receiving affirmative responses then approved the request withdrawing said charge and stated to affiant that the National Labor Rela-

tions Board, Twenty-First Region, could then proceed with the processing of representation petitions theretofore filed by said Company.

That because of a statement contained in Mr. Charles F. Armin's letter of May 17, 1949, to Mr. G. J. Bott, Associate General Counsel, National Labor Relations Board, to the effect that Mr. Robert R. Rissman had been separated from the case, affiant, on or about May 25, 1949, telephoned Robert R. Rissman at Michigan 9708, and asked Mr. Rissman whether it was true that he had withdrawn from the unfair labor practice charge filed against the Company. That Mr. Rissman stated to affiant that he had not been active in the case and had filed it at the request of said Union because Charles F. Armin, International Representative for the Union, was not available and that Mr. Armin had actually been handling the case from the beginning.

/s/ WALLACE E. AVERY

Subscribed and sworn to before me this 1st day of July, 1949.

[Seal] /s/ ADA L. COLEMAN,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires Sept. 30, 1951.
Affidavits of Service by Mail attached.

[Stamped]: Received Oct. 24, 1949 NLRB.

United States of America
Before the National Labor Relations Board
Case No. 21-CA-295

In the Matter of

THE TEXAS COMPANY
and
ROBERT RISSMAN

Case No. 21-CA-375

In the Matter of

THE TEXAS COMPANY
and
GEORGE CODY

DECISION AND ORDER

On June 16, 1950, Trial Examiner William F. Scharnikow issued his Intermediate Report in this consolidated proceeding, finding that, in Case No. 21-CA-295, the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that, in Case No. 21-CA-375, the Respondent had not engaged in certain alleged unfair labor practices and recommended the dismissal of the complaint relating to that case in its entirety. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate

Report and supporting briefs. Statements in the nature of exceptions were also filed by the charging party in Case No. 21-CA-375, and by two employees of the Respondent, Nickerson and Miller.¹ The Respondent's request for oral argument is denied because the record and the briefs, in our opinion, adequately present the issues and positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.² The Board has considered the Intermediate Report, the briefs and exceptions, and the entire record in the case, and hereby adopts only those findings and conclusions of the Trial Examiner that are consistent with this Decision and Order.

¹These two employees contended that their names were inadvertently omitted from the amended complaint in Case No. 21-CA-295. As we are dismissing the complaint in that case, we find it unnecessary to pass upon this contention.

²We find no basis for the Respondent's contention that the charges in Case No. 21-CA-295 were filed by Rissman "fronting" for a noncomplying union. The asserted noncompliance of the Oil Workers Unions is based solely on the ground that the International was affiliated with the then noncomplying parent CIO, a fact which, in our opinion, does not impair the compliance status of the International. See *J. H. Rutter-Rex Manufacturing Co., Inc.*, 90 NLRB No. 15. In any event, the CIO is now in compliance and has been since 1949.

Case No. 21-CA-295

The issues before the Board in this case arise out of a strike which the Union³ called in September, 1948, for the purpose of enforcing wage demands, involving—so far as this case is concerned—three bargaining units of the Respondent's Pacific Coast Division.

The Trial Examiner found that, by the letter which the Respondent sent its striking employees on September 28 and by a number of related statements made by supervisors of the Respondent to a few strikers,⁴ the Respondent interfered with the rights of its employees to engage in concerted activities, in that it sought to undermine the authority of the statutory bargaining representative by dealing with the employees individually, in violation of Section 8 (a) (1). He further found that this conduct by the Respondent converted the economic strike into an unfair labor practice strike, and that, as a consequence, the Respondent's refusal to reinstate the strikers, on the ground that they had been permanently replaced by the time they requested reinstatement, discriminated against the strikers in violation of Section 8 (a) (3). For the reasons stated below, we do not agree that the Respondent's letter, or any other conduct by the Respondent during the strike, violated the Act.

³“Union” refers to Oil Workers International Union and its Locals 120 and 128, interchangeably.

⁴The 13 episodes which the Trial Examiner found violative are set forth in detail in the Intermediate Report.

The September 28 letter which was signed by Division Manager James T. Wood, Jr., and addressed, without consultation with the Union, to all of the strikers, except two who had been discharged, read as follows:

There is no indication at present when the strike called by the Oil Workers International Union (CIO) will end.

It has therefore been decided to resume normal Producing Department Operations in the Los Angeles Basin and Ventura Districts as promptly as possible.

Employees who return to work on or before October 4, 1948, will find jobs available for them. After October 4, 1948, full measure will be taken to fill all remaining vacancies from every available source. As to those employees who do not return to work on or before October 4, 1948, the Company will take whatever action may be deemed to be proper at the time.

You may have been told that if you come back to work before the strike is ended, the Union will compel the Company to discharge or otherwise discriminate against you. I assure you no employee returning to work before the strike is ended will be discriminated against or penalized now or in the future because of that fact.

If you want to return to work, you should communicate with your Foreman or Superintendent for instructions.

The Trial Examiner suggested that this letter was proper insofar as it advised the strikers that the Respondent intended to avail itself of its privilege under the Act to resume operations,⁵ and merely reported that strikers would not be replaced before October 4. However, he found that the letter illegally sought to induce the employees to return to work by threatening to condition the return to work after October 4 upon the loss of seniority.

We are, however, unable to read, either in the September 28 letter or in any later conduct by the Respondent, any threat that the strikers would lose their seniority unless they return to work by the date specified in the letter for the beginning of replacements. The letter speaks of "taking whatever action may be deemed to be proper at the time." No reference is made to seniority and we find no reason in the record to believe that by "proper" action, the Respondent contemplated, or could reasonably have been believed by the strikers to be contemplating, anything other than action which the statute permits.⁶ The oral statements later made by

⁵ *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333.

⁶ In fact, the Respondent, in acting as it "deemed to be proper," hired no replacements until October 5, the day after the so-called deadline; promoted none of the nonstrikers or earlier returned strikers between September 28 and October 4; gave every striker who returned his old job unless it had been filled by the time he returned either by promotion or new employment; gave every replaced striker the job nearest to his old job; told strikers who applied after all available jobs had been filled that they

supervisors to individual employees were all in the same general vein as the September 28 letter and likewise contained no specific threats with regard to seniority or any other matter. It is true that the Respondent failed to clarify its policy with respect to relative seniority until sometime after the September 28 letter, but we find nothing in this fact which would warrant our reading a threat into the Respondent's earlier statements.⁷

would be given preferential consideration for employment in the first vacancies which occurred, for which they were qualified; restored all pension, past service, and other rights; and kept "permanent" replacements in their positions. Cf. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, *supra*.

⁷ In reaching a contrary conclusion, the Trial Examiner relies upon Superintendent Loomis' statement that seniority status for strikers was undecided at the time of the October 8 conference, the intramanagement memorandum of October 6 which stated that the applicability of "former" seniority to "promotions, demotions, and lay-offs" was to be deferred, and the intramanagement memorandum of November 17 advising the superintendents not to discriminate in considering the applications of any "former employees," i.e., the replaced strikers. "Former seniority" was a composite of five separate, different, and distinct types of seniority recognized in the contracts: Length of service with the Company, operations seniority, district seniority, and seniority credit "spiked" on June 16, 1938, collectively described by the General Counsel and the Trial Examiner as "accumulated" seniority.

Unlike the Trial Examiner, we find that the Respondent's difficulty in determining the relative status of returning strikers and nonstrikers, earlier returning strikers, and replacements was warranted by the complexity of the problem.

Absent a threat or a promise of benefit designed to coerce the strikers into returning by the deadline date, the legality of the Respondent's individual solicitation of the strikers must be determined against the background in which such solicitation was done.⁸ For, although the Board has, in the past, found individual solicitation of strikers violative of the Act, in all such cases one or both of the following two factors has been present: (1) The solicitation has constituted an integral part of a pattern of illegal opposition to the purposes of the Act as evidenced by the Respondent's entire course of conduct,⁹ or (2) the solicitation has been conducted under circumstances, and in a manner, reasonably calculated to undermine the strikers' collective bargaining representative and to demonstrate that the Respondent sought individual rather than collective bargaining.¹⁰

⁸United Welding Company, 72 NLRB 954; see *N.L.R.B. v The Sands Manufacturing Company*, 306 U.S. 332, 342, and *Colgate Manufacturing Corporation*, 85 NLRB 864. Cf. *The Cincinnati Steel Castings Company*, 86 NLRB 592, and *Kansas Milling Company*, 86 NLRB 925, (reversed and remanded in 185 F. 2d 413 (C. A. 10), where there was coercion inherent in the solicitation itself.

⁹*Cathey Lumber Company*, 86 NLRB 157, enfd., 165 F. 2d 1021 (C.A.5) where the Board also found a refusal to bargain, a refusal to reinstate strikers although vacancies existed, and independent coercive statements; see *The W. T. Rawleigh Company*, 90 NLRB No. 271; *The Cincinnati Steel Castings Company*, *supra*; *Kansas Milling Company*, *supra*.

¹⁰In *Sam'l Bingham's Son Mfg. Co.*, 80 NLRB 1612, the Board noted that Bingham told the solicited pickets "that he would not invite a conference with

Neither factor is present here.

The record before us contains no evidence of any other unfair labor practices, indicative of an anti-union animus on the part of the Respondent, now¹¹ or in the past.¹² It is clear, as the Trial Examiner found, that the Respondent's decision to resume operations was motivated by bona fide business considerations.¹³ It sought to implement this decision by an individual appeal to the strikers which, as we have found, contained no threat or promise of benefit. And there is no basis in the record for inferring that by resorting to the individual sollicita-

the Union 'until Hell freezes over''; see *Hart Cotton Mills, Inc.*, 91 NLRB No. 130; cf. *J. I. Case v. N.L.R.B.*, 321 U.S. 332; *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678.

¹¹ It is true in Case No 21-CA-375 we are finding, below, that the Respondent violated the Act in refusing to reemploy Cody. However, as stated there, the circumstances surrounding that unfair labor practice are of a special and unusual character, which, standing alone, we do not consider as indicative of general union animus on the part of the Respondent.

¹² The Union and the Respondent first entered contractual relations in the Gasoline Operations in 1938, in the L.A. Producing Operations in 1941, and in the Ventura Operations in 1947. At all times after these respective dates the Union and the Respondent had contractual relations with one another. There had been no earlier unfair labor practices charged.

¹³ After a month of the strike, the Respondent was suffering from drainage of oil from its idle properties by adjoining producers who were operating and had been threatened with lawsuits by lessors if such drainage were permitted to continue because of non-operation.

tion the Respondent was seeking to undermine the representative status of the Union. On the contrary, at no point did the Respondent disparage the Union; there is no contention that the Respondent did not bargain in good faith during its meetings with the Union, some of which took place during the strike;¹⁴ and the likelihood that the individual solicitation of the strikers would demonstrate a propensity to resort to individual rather than collective bargaining is greatly diminished by the fact that the Respondent had earlier made abundantly clear its intention of continuing to recognize and deal with the Union.¹⁵

¹⁴ Such meetings were held on April 8, June 7, June 10, October 25, and October 27. The Union ended negotiations on June 7 and did not renew its request for negotiations until October 22.

¹⁵ Thus, on September 9, 1948, an advertisement signed by the six major struck oil companies — Standard, Tidewater, Shell, Richfield, Union, and the Respondent—was published in the Los Angeles Times under the heading “Who Wants an Oil Strike.” The advertisement stated that it was in the public interest to keep the refineries operating and that the companies, the public, and many employees did not want the strike. It further stated that the companies were at all times ready to meet with the Union “at any time.” On September 23, the Respondent mailed a letter to all employees who were striking stating its position on its offer of 12½ cents per hour wage increase, which the Union had accepted elsewhere, and certain other matters including the clarification of certain current rumors. This letter recognized and reaffirmed the bargaining relationship.

In addition, although the contracts had expired by their terms on May 15, May 25, and August 20, 1948, respectively, the Respondent continued to operate its

Under the particular circumstances here disclosed, we are unanimously of the opinion that the Respondent took no action which the employees might reasonably interpret as a disparagement of the collective bargaining process or which amounted to a withdrawal of recognition of the Union's representative status or to an undermining of its authority.¹⁶ As the Board observed in comparable circumstances, "to penalize this employer for proffering the jobs once again to economic strikers on the same terms to be offered replacements, would penalize open dealing and invite silent displacement of striking employees, a result which seems to us more likely to be productive rather than preventive of industrial strife and thus not to effectuate the purposes of the Act."¹⁷ Accordingly, we conclude that the Respondent engaged in no conduct during the strike of September, 1948, which converted that economic strike to an unfair labor practice strike.¹⁸

business under the terms of the contracts and checked off union dues until the outbreak of the strike.

¹⁶ The Board thus summarized the criteria for finding interference with the right to engage in collective bargaining in *Central Metallic Casket Co.*, 91 NLRB No. 88.

¹⁷ *Times Publishing Company*, 72 NLRB 676, 684; see also *United Welding Company*, *supra*, and *Roanoke Public Warehouse*, 72 NLRB 1281, 1283.

¹⁸ It is, therefore, unnecessary for us to pass upon the Respondent's contention that, in any event, the conduct found violative by the Trial Examiner was not such as would, under the circumstances, convert the strike into an unfair labor practice strike.

Thus the strike remained economic in nature, and as the record establishes that the Respondent refused to reinstate the strikers on the sole ground that they had been permanently replaced, we find that such refusal did not violate Section 8 (a) (3) or 8 (a) (1) of the Act.

We are satisfied that the replacements were assured that if they desired, their jobs might be permanent,¹⁹ and we therefore do not regard it as material that under the then existing contract provisions employees could not acquire "permanent" status until after 120 days of employment. Like the Trial Examiner, and for the reasons stated in the Intermediate Report, we find no merit in the General Counsel's contention that the Respondent discriminated against the replaced strikers by filling some later vacancies by making interdivisional transfers rather than by recalling the strikers.²⁰ Finally, we are satisfied that the record discloses no instance in which returning strikers were discriminated against because of their strike activity in regard to seniority²¹

¹⁹ The only strikers who returned before all available jobs were filled who were not employed were those who conditioned their request upon the reinstatement of more strikers than there were jobs available (see *Oklahoma Rendering Company*, 75 NLRB 1112), or who refused proffers of the available jobs.

²⁰ Cf. *The Firth Carpet Company v. N.L.R.B.*, 129 F. 2d 633, 636 (C.A. 2), enfg. 33 NLRB 191, where transfers were found to be "makeshift" because no new individuals were hired as initial replacements.

²¹ In reaching this conclusion, we do not, however, adopt the Trial Examiner's apparent assumption that the right of the strikers not to be discriminated

or any other term or condition of employment.

Accordingly, the Board unanimously dismisses the complaint relating to Case No. 21-CA-295 in its entirety.²²

Case No. 21-CA-375

The issues in this case arise out of the following facts: George Cody, who after working for the Respondent for 20 years had been recently promoted to supervisor, was discharged on September 28, 1948, for refusing, because of his past participation in union activities, to perform rank-and-file production work assigned him during the strike. Immediately upon his discharge, Cody reinstated his union mem-

against with respect to seniority depended upon whether the contracts containing the seniority provisions continued in existence after the strike. See *General Electric Company*, 80 NLRB 510. Accordingly, we find it unnecessary to pass upon, and do not adopt, the Trial Examiner's conclusion that the contracts which had expired by their terms were unilaterally extended for more than 60 days thereafter, because of the Respondent's failure to give the notice required under Section 8 (d) of the Act.

²² As we are dismissing the complaint relating to Case No. 21-CA-295 in its entirety, we find it unnecessary to adopt, or pass upon, the Trial Examiner's reasons for finding no policy bar to this proceeding because of (1) the strike settlement agreement between the Oil Workers International and the Respondent, (2) the withdrawal "with prejudice" by the Oil Workers of that portion of the charges in Case No. 21-CA-239, relating to the Respondent's Pacific Division and including allegations arising out of the 1948 strike, or (3) the Acting Regional Director's approval of this request for withdrawal of the charge.

bership and actively participated in the strike campaign and picketing. From November 4, when the strike was settled in his department, to November 15, Cody applied for reinstatement as a supervisor. On November 8, Dreyer, the superintendent who had discharged him, asked him if he would accept a job which required him to cross remaining picket lines. Cody said he had refused to do that on the 28th and would again. Dreyer then told Cody that his decision, too, was the same as it had been on the 28th. On November 15, O'Connor, the manager of the refining department and Dreyer's superior, asked Cody whether he really wanted to work for the Company, suggesting that maybe Cody should make his career in organized labor.

On November 16, Cody apologized to Dreyer for the mistakes he had made when a foreman and asked for his job or any job. Dreyer delayed decision, and on the 19th told Cody that his decision was still the same as it had been on September 28 and wished Cody luck in finding another job. Thereafter, Cody reapplied, but was only told by Dreyer that Dreyer's reason for refusing to hire him had been fully discussed. O'Connor who had left the matter to Dreyer, indicated dissatisfaction with Dreyer's approach, but did nothing to secure Cody a job. It is clear, and we find, that on and after November 16, Cody requested employment in a rank-and-file job and the Respondent recognized the request as such.

The Trial Examiner found that the Respondent did not violate Section 8 (a) (3) of the Act by refusing to hire Cody as a rank-and-file employee for

the sole reason that he had been discharged as a supervisor for refusing to do production work during the strike, because the refusal to hire, being based "neither upon the membership of the former supervisor in a union nor any protected activities on his part," did not discharge membership in the striking union. A majority of the Board does not agree with this conclusion.²³

Like the General Counsel, we believe that the Trial Examiner has misconceived the effect of the 1947 amendments which removed supervisors from the protection which the Act accords to "employees."²⁴ As we read these amendments, they were not intended to change the character of union or other concerted activity engaged in by supervisors. Concerned with the problem of divided loyalties, Congress, in these amendments absolved from liability under the Act

²³ Members Reynolds and Murdock dissent from this portion of the decision (in Case 21-CA-375), for the reasons set forth in their separate opinion attached hereto.

²⁴ The relevant amendments are contained in Section 2 (3), which provides that the term "employee" shall include "any employee, and shall not be limited to the employees of any particular employer . . . but shall not include . . . any individual employed as a supervisor . . ."; Section 2 (11) which defines "supervisor"; Section 14 (a) which provides "(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

employers who discharge or otherwise discriminate against supervisors for such activity, or who refuse to recognize the collective bargaining representatives of supervisors.²⁵ But to say that such activities are no longer accorded affirmative protection, is not to say that they are also tainted with illegality. The refusal by Cody as a supervisor to perform rank-and-file work of strikers was concerted activity of a type which was protected under the Wagner Act.²⁶ The

²⁵ See *N.L.R.B. v. Edward G. Budd Manufacturing Company*, 169 F. 2d 571 (C.A. 6).

²⁶ The Board and the Courts consistently held that Section 2 (3) of that earlier Act, protecting "any employee," included "supervisors" as "employees." See *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 493, citing with approval *Soss Manufacturing Company*, 56 NLRB 348. The latter case noted that the rights under the Act of supervisors to protection in their organization activities were qualified by the need of the employer to maintain his neutrality toward the organizational activities of other employees. As an "employee" a supervisor was protected in (1) joining a rank-and-file union (*Golden Turkey Mining Company*, 34 NLRB 760, 776-779; *Freuhauf Trailer Company*, 1 NLRB 68, 76, enfd. 301 U.S. 49, 55); (2) joining in a rank-and-file strike on behalf of the rank-and-file union to which he belonged (*Mackay Radio & Telegraph Company*, 1 NLRB 201, 222-225, enfd. 304 U.S. 333, 346-347); (3) joining with other members of a foremans' union to assure rank-and-file strikers that the foremen, belonging to another union, would not take their jobs (*American Steel Foundries v. N.L.R.B.*, 158 F. 2d 896 (C.A. 7), enfg. 67 NLRB 27; 68 NLRB 514; (4) joining other foreman in a strike, primarily for their mutual aid, against performing rank-and-file work during a rank-and-file strike (*E.A. Laboratories, Inc.*, 87 NLRB 233); and

first clause of Section 1 (a) of the 1947 amendments made it crystal clear that Congress did not convert this conduct into activity akin to picket line violence, wilful destruction of the Respondent's property, a sitdown strike — conduct which would be “unprotected concerted activity” constituting “cause” for the discharge of any employee. Although the amendments privilege the present discharge, they did not redefine the nature of the activity.

When Cody applied for employment in a non-supervisory job on November 16, 1948, he was no longer “employed as a supervisor” and was then within the protection of the Act. He stood in the position of an “employee,” whether or not he had ever worked for the Respondent²⁷ and the only form of “unprotected” concerted activity which could privilege the Respondent's refusal to hire him was such as would justify the refusal to reinstate any “employee.”²⁸ The Respondent gave as its only reason for refusing to hire Cody the fact that he had been

(5) assisting a rank-and-file strike by refusing to perform struck work, whether or not a member of the striking union (Pinaud, Incorporated, 51 NLRB 235).

²⁷ See *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177; *Briggs Manufacturing Company*, 75 NLRB 569; *John Hancock Mutual Life Insurance Company*, 92 NLRB No. 27.

²⁸ This rule is consistent with the Board's holding in *United Elastic Corporation*, 84 NLRB 768, relied upon by the Respondent. In that case, the Board held that “unprotected concerted activity” by employees justified the employer in discharging and refusing to reinstate those involved.

discharged “for cause” as a supervisor, but the “cause” which led to Cody’s discharge was concerted activity which, had Cody been an “employee,” would have rendered the refusal to employ him unlawful.²⁹ Thus, to say that the refusal to hire Cody was based on unprotected concerted activity ignores completely the special character of the limitations on union activity by supervisors, and the fact that even such limitations were inapplicable to Cody when he applied for employment.

Moreover, unlike our dissenting colleagues, we do not regard as controlling the fact that in refusing Cody employment the Respondent may not have been motivated by a specific purpose to interfere with and discourage rank-and-file union activity. The situation before us is not unlike those cases in which employees join sympathetically in protected concerted activity initiated by a union in which they are not, and perhaps even could not become, members. This Board and the Courts have held³⁰ that reprisal against such employees necessarily discourages not only their participation in concerted activities, but also active union membership on the part of the employees on whose behalf they acted. So here, we think that membership in the rank-and-file union was pal-

²⁹ Even though the refusal to do the work assigned might have privileged the company permanently to replace him. See *Gardner-Denver Company*, 58 NLRB 81.

³⁰ E.g. *N.L.R.B. v. Biles Coleman Lumber Co.*, 98 F. 2d 18 (C.A. 9); see *American Steel Foundries v. N.L.R.B.*, 158 F. 2d 896 (C.A. 7).

pably discouraged when Cody, entitled to the protection of the Act, was refused employment solely because he had, in the past, made common cause, in a manner which was not unlawful, with protected concerted activity by the rank-and-file union. And in reaching that conclusion we, unlike our dissenting colleagues, see no conflict with the decision of the Board in the *Panderia* case.³¹ In that case the alleged discriminatee was discharged for having engaged in conduct on his own in aid of agricultural laborers who, like supervisors, are excluded from the protection of the Act. The Board found no "concerted activity" protected by the Act, and rejected the contention that such a discharge was violative of the Act because it may have had the incidental effect of discouraging union or other concerted activity by the nonagricultural employees protected by the Act. But the discharge in that case was one which was clearly aimed at the activities of agricultural employees, and of the single nonagricultural employee who joined with them. The effect it may have had upon the activities of nonagricultural employees was, in those circumstances, regarded as "incidental."³² In the present case, however, the conduct upon which

³¹ *Panderia Sucesion Alonso et al.*, 87 NLRB 877. (Chairman Herzog and Member Houston dissented on this point.)

³² Although agreeing with the distinction between the instant case and the *Panderia* case stated above, and in therefore concluding that *Panderia* is not controlling here, Member Styles, who did not participate in that case, does not thereby wish to be deemed as having passed on the issues in that case.

the Respondent's refusal to hire Cody was ultimately based was his activity in aid—not of other supervisors—but of the very rank-and-file employees whose number he was later prevented from joining by that refusal. To conclude that this did not discourage activity by the rank-and-file employees would totally ignore the realities of the situation.

In sum, we do not believe that Congress intended the employer's privilege to discriminate against supervisors for what would otherwise be protected concerted activity likewise to privilege an employer to refuse to hire an individual for a rank-and-file job, because of his former concerted activity as a supervisor.³³ On the evidence before us, we are satisfied that the refusal to hire Cody was predicated on his concerted activity in the interest of the rank-and-file strike. Such a refusal necessarily discouraged membership in, and concerted activity on behalf of, the labor organization involved, not only by Cody but by all his fellow employees, thereby violating Section 8 (a) (3) and 8 (a) (1) of the Act.

³³ Clearly, the Board may not order the employer to employ an applicant who is rejected "on account of some permissible criterion." *N.L.R.B. v. Waumbec Mills*, 114 F. 2d 226, 234 (C.A. 1). Thus, the Board has recognized that an employer may promulgate a nondiscriminatory rule against "down grading" and thereby justify refusing rank-and-file employment to a former supervisor discharged for continuing union membership. *Lily-Tulip Cup Corporation*, 88 NLRB No. 170. In the present case, however, the Respondent made a practice of down grading to their former positions those who were unsatisfactory as supervisors.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, we shall order the Respondent to offer Cody immediate employment as a rank-and-file employee in its pipe line division of the refining department, Pacific Coast Division, Los Angeles, California, with back pay from the date, after November 16, 1948, when the Respondent first employed any individual in any job for which Cody was qualified to the date on which the Intermediate Report issued and from the date on which this Decision and Order issues to the date of its offer to Cody. We shall order that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of employment. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which the employee would normally have earned for each quarter or portion thereof, less his net earnings,³⁴ if any, in other employ-

³⁴ By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for this unlawfull discrimination and the consequent necessity of his seeking employment elsewhere. *Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal or other work-relief projects shall be considered earnings. *Republic Steel Corporation, v. N.L.R.B.*, 311 U.S. C.

ment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

We shall also order the Respondent to make available to the Board upon request payroll and other records to facilitate the checking of the amount of back pay due.³⁵

The Board ordinarily regards a violation of Section 8 (a) (3) of the Act as sufficiently indicative of a propensity to commit other unfair labor practices to warrant an order to cease and desist from in any manner interfering with the rights of employees under the Act. In this particular case, however, because of the novel circumstances involved we do not find that the Respondent's conduct demonstrates a general opposition to the purposes and policies of the Act. Accordingly we shall confine the cease and desist provisions of our order to the specific conduct found and any like or related conduct.

ORDER

Upon the entire record of the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Texas Company, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating with regard to the hire and tenure of employment of George Cody.

³⁵ F. W. Woolworth Company, 90 NLRB No. 41.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organization, to join or assist Oil Workers International Union, affiliated with the Congress of Industrial Organizations, or Locals 120 or 128 thereof, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer George Cody immediate employment as an employee in its pipe line division of the refining department, Pacific Coast Division, Los Angeles, California.

(b) Make whole George Cody in the manner set forth in the section entitled "The Remedy," for any loss of pay he may have suffered by reason of the Respondent's discrimination against him.

(c) Upon request, make available to the Board or its agents, for examination and copying, all pay-

roll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the right of employment under the terms of this Order.

(d) Post at its office for the pipe line division of the refining department, Pacific Coast Division, Los Angeles, California, copies of the notice attached hereto.³⁶ Copies of said notice shall be furnished to the Respondent by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of said Respondent, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

It Is Further Ordered that the complaint be and

³⁶ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

it hereby is dismissed insofar as it alleges violations charged in Case No. 21-CA-295.

Signed at Washington, D. C., April 16, 1951.

PAUL M. HERZOG,

Chairman

JOHN M. HOUSTON,

Member

JAMES J. REYNOLDS, JR.,

Member

ABE MURDOCK,

Member

PAUL L. STYLES,

Member

[Seal]

NATIONAL LABOR RELATIONS
BOARD.

Members James J. Reynolds, Jr., and Abe Murdock, dissenting in part only:

We do not agree with the majority in Case 21-CA-375 that the Respondent's refusal to hire Cody as a rank-and-file employee constituted unlawful discrimination, within the meaning of the Act.

Admittedly, Cody was discharged as a supervisor for his insubordinate conduct in refusing to do production work during the strike of the nonsupervisory employees, and later was denied employment as a rank-and-file employee for the same reason. The Board is unanimous in holding that because Cody was a supervisor his concerted activity was not protected by the present Act³⁶ and therefore his discharge was

³⁶ In our opinion, it is immaterial whether Cody's conduct as a supervisor in making common cause

not unlawful. We also agree with the majority that nevertheless when Cody thereafter sought employment with the Respondent in a nonsupervisory position, he stood in the position of an "employee" and was therefore entitled to the full protection of the Act, just like any other applicant. But, unlike the majority, we are unable to find that the Respondent's treatment of Cody as an applicant was violative of the Act.

For the purpose of defining the correlative rights and obligations of the parties herein, we see no materiality to the distinction which the majority seeks to draw between unprotected supervisory activity under the present Act and the other types of activity previously found unprotected under the Wagner Act, for, the basic issue in cases of this kind is, and always has been, whether the employer interfered with employee concerted activity which Congress immunized against reprisal. Under the Act the Respondent was privileged to refuse to reemploy Cody in a nonsupervisory position for any reason whatsoever, provided only that it was not motivated by a purpose to interfere with and discourage rank-and-file activity.³⁷ As the Trial Examiner found and the majority apparently concedes, there is no evidence that the Respondent was so unlawfully motivated in refusing to reemploy Cody. Indeed, it is clear, as the majority finds, that the Respondent's reprisal action was based solely on Cody's unprotected and

with nonsupervisory employees would have been protected concerted activity under the Wagner Act, as found by the majority.

³⁷ *Pepsi-Cola Bottling Co.*, 72 NLRB 601.

insubordinate conduct as a supervisor and not on any actual or anticipated activity by him as an employee on behalf of the Union. Consequently, we are satisfied that the denial of employment to Cody was not violative of the Respondent's obligation not to discriminate or of Cody's right as an employee to engage in concerted activity.

In the circumstances of this case, we are unable to accept the majority's basic conclusion that because the refusal to rehire Cody, for his unprotected activity as a supervisor, "necessarily discouraged" rank-and-file concerted activity and membership, the respondent thereby violated the Act. A somewhat similar legal argument was rejected in *Panaderia Sucesion*,³⁸ where a majority of the Board stated:

The fact that the discharge [of the complainant] may have had the incidental effect of discouraging [employee concerted activity] does not cause the Respondents' essentially privileged conduct to assume the character of an unfair labor practice. Whenever an unfair labor practice is filed with the Board based upon an employer's discharge of active union members, it can be argued that such discharges restrain and discourage other employees from engaging in union activity. Nevertheless, if the Board finds that such employees were discharged because they had engaged in activities unprotected by the Act or were discharged for cause, the Board invariably refuses to find that the employer committed an unfair labor

³⁸ 87 NLRB 877.

practice, notwithstanding the incidental effect upon other employees.

In our opinion, the reprisal actions against Cody as a supervisor and as an applicant both sprang from the same unprotected supervisory activity; they had the same incidental discouraging impact on rank-and-file union activity and therefore should be measured by the same standard of liability. Since the discharge of Cody was admittedly privileged notwithstanding any discouraging effect on rank-and-file concerted activity,³⁹ we are satisfied that the respondent was privileged in its effort to discourage supervisory concerted activity to penalize Cody for his unprotected insubordination as foreman by denying him nonsupervisory employment.

Accordingly, we would also dismiss the complaint as to Cody.

Signed at Washington, D. C.

JAMES J. REYNOLDS, JR.,
Member

ABE MURDOCK,
Member

NATIONAL LABOR
RELATIONS BOARD

³⁹In removing supervisors from the protection of the Act, Congress recognized that rank-and-file concerted activity might thereby be incidentally discouraged.

Notice to All Employees Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will offer to George Cody immediate employment as an employee, and make him whole for any loss of pay suffered as a result of the discrimination against him.

We will not in any like or related manner interfere with, restrain or coerce, our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Oil Workers International Union, affiliated with the Congress of Industrial Organizations or Locals 120 or 128 thereof, or any other labor organization to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

Dated

THE TEXAS COMPANY

(Employer)

By

(Representative)

(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Cases Nos. 21-CA-295 - 21-CA-375.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a second amended charge filed in Case No. 21-CA-295 by Robert Rissman on February 3, 1949, on behalf of 50 individuals claiming to be employees of The Texas Company (herein called the Respondent),¹ and upon a first amended charge filed in Case No. 21-CA-375 by George Cody on March 17, 1949,² the Regional Director for the Twenty-first Region (Los Angeles, California), acting for the General Counsel of the National Labor Relations Board,³ on April 13, 1949, issued an order consolidating the two cases, a notice of hearing, and a consolidated complaint against the Respondent, alleging that the Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2

¹The original charge in Case No. 21-CA-295, was filed on December 9, 1948, and served upon the Respondent on December 13, 1948. The second amended charge was served upon the Respondent on February 7, 1949.

²The original charge in Case No. 21-CA-375, was filed on February 18, 1949, and served upon the Respondent on February 23, 1949. The first amended charge was served upon the Respondent on March 21, 1949.

³The General Counsel and the staff-attorneys appearing for him at the hearing are herein referred to as the General Counsel; the National Labor Relations Board is referred to as the Board.

(6) and (7) of the National Labor Relations Act,⁴ herein called the Act. Copies of the consolidated complaint, the basic charges and the notice of hearing were duly served upon the Respondent and the charging parties.

On October 18, 1949, the Regional Director, pursuant to Section 203.15 of the Board's Rules and Regulations, Series 5 as amended, issued an amended consolidated complaint alleging that the Respondent had engaged in, and was engaging in, unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act. Copies of the amended consolidated complaint, an order of the Regional Director resetting the hearing date, and a notice of further adjournment of the hearing, were served upon the Respondent and the charging parties.⁵

With respect to the unfair labor practices, the consolidated amended complaint, alleges in substance: (1) that a substantial number of the Respondent's employees went on strike; (2) that on or about October 6, 1948, and thereafter, the claimants, who were striking employees and whose names are set forth in Appendices A, B and C uncondition-

⁴ 61 Stat. 136.

⁵ At the hearing, counsel for the Respondent waived objection to the hearing being held less than 10 days after the amendment of the consolidated complaint upon condition that a 2-day recess be granted to him at the close of the General Counsel's case. The hearing proceeded and the requested recess was given.

ally offered to return to work and abandon the strike but the Respondent refused to reinstate them because of their activities in support of the strike; (3) that the Respondent interfered with, restrained, and coerced its employees by soliciting and urging them to abandon the strike, and conditioning their return on the loss of their accumulated seniority; (4) that by these activities the strike was prolonged and converted from an economic strike into an unfair labor practice strike; (5) that on or about November 16, and thereafter, George Cody, was on his application, refused employment by the Respondent because of his concerted activities on behalf of the Oil Workers International Union, affiliated with the Congress of Industrial Organizations, hereinafter called the Oil Workers.

In its answer to the amended consolidated complaint, the Respondent denied that it had interfered with, restrained, or coerced its employees or discriminated against them in regard to hire, tenure, or conditions of employment. It alleged that George Cody, then a supervisor, was discharged for cause on September 28, 1948, and for that reason was subsequently refused reemployment. It further alleged that the matters in dispute were settled by agreement with the Oil Workers, and that the matters charged in the present cases were the same as were contained in a charge previously filed by the Oil Workers which was withdrawn on November 19, 1948, "with prejudice" and with the approval of the Board's Acting Regional Director.

Pursuant to notice, a hearing was held in Los An-

geles, California, on various dates from October 26, 1949, to November 23, 1949, inclusive, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.

At the beginning of the hearing, the undersigned granted an unopposed motion by the General Counsel further to amend the consolidated complaint to correct the misspelling of the name of one of the claimants. Thereafter, the undersigned denied motions by the Respondent's counsel to dismiss the complaint because (1) the Oil Workers' settlement of the strike and withdrawal of its previous charges "with prejudice" and with the approval of the Acting Regional Director should, as a matter of policy and law, bar continuation of the present proceeding; and (2) George Cody was a supervisor and, therefore, not an employee within the meaning of the Act.

At the conclusion of the General Counsel's case, the undersigned denied (1) a motion by the General Counsel further to amend the complaint by adding allegations to the effect that the Respondent committed unfair labor practices within the meaning of Section 8 (a) (1) of the Act by refusing and failing to continue in full force and effect, after their expiration dates, the provisions of contracts covering employees of the Respondent and executed by the Respondent with Locals 120 and 128 of the Oil Workers; and (2) motions by the Respondent to dismiss

the complaint on the grounds previously urged and also upon the additional ground that the proof thus far submitted did not support the allegations of the complaint.

At the conclusion of the hearing, the Respondent moved for the dismissal of the complaint on the grounds previously urged. The undersigned reserved decision on this motion. It is now disposed of in accordance with the considerations hereinafter set forth. Both the General Counsel and the Respondent waived oral argument before the undersigned at the hearing.

On January 31, 1950, the undersigned received briefs both from the General Counsel and from counsel for the Respondent. Since then, by telegram dated May 15, 1950, counsel for the Respondent moved for a dismissal of the amended consolidated complaint so far as it is based upon the charge in Case No. 21-CA-295, on the ground that the evidence shows that the charge in that case "was filed under the auspices of, and appeals in connection therewith were filed by" the Oil Workers, a labor organization affiliated with the Congress of Industrial Organizations, which was not in compliance with Section 9 (h) of the Act at the time the complaint was issued. In support of the motion, the Respondent cites the recent decision of the Fifth Circuit Court of Appeals in *N. L. R. B. v. Postex Cotton Mills*, F. 2d. The General Counsel, in turn, filed his opposition to this motion. The undersigned believes that neither the decision cited nor its reasoning is applicable to the charges in the present case for the following reasons:

(1) the instant charges were filed by individuals and not by a labor organization; (2) they do not seek, and cannot result in, a bargaining order which would benefit a noncomplying labor organization; (3) whether a noncomplying labor organization prompted, assisted or effected their filing and processing is therefore immaterial, the problem being rather whether the evidence adduced at the hearing justifies a finding that the Respondent interfered with the rights of its employees, and an order protecting these rights and remedying the interference. The undersigned therefore denies the Respondent's motion.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of the Respondent

The Texas Company is a Delaware corporation with its headquarters in New York City. It is engaged in the production, manufacture, and distribution of petroleum products in various parts of the United States, including field and refining operations at and near Los Angeles and Ventura, California. During the year preceding the hearing, the Respondent produced and refined petroleum and petroleum products in its operations at and near Los Angeles and Ventura, of a value exceeding \$1,000,000. During the same year, more than 50 per cent of these products were transported by the Respondent, or

others on its behalf, to points outside the State of California. The undersigned finds that the Respondent has been engaged in, and is engaged in, operations at and near Los Angeles and Ventura, California, which affect commerce within the meaning of Section 2 (6) of the Act.

* * * * *

II. The Labor Organizations Involved

Oil Workers International Union and Locals 120 and 128 thereof, which are affiliated with the Congress of Industrial Organizations, are labor organizations within the meaning of Section 2 (5) of the Act.

IV. The Alleged Unfair Labor Practices in Case No. 21-CA-375

A. Introduction

George Cody was employed by the Respondent in the pipe-line department in the Los Angeles Basin District in various rank and file jobs from laborer to field gauger from April 6, 1928, until February, 1948, at which time he was promoted to become an assistant foreman. On September 28, 1948, during the fourth week of the strike, he was discharged. Failing in applications to secure reinstatement, he then applied for a rank and file job with the Respondent. The Respondent rejected this application.

It is undisputed that the Respondent's discharge of Cody as an assistant foreman was not a violation of the Act, since Cody was then a "supervisor" and not an "employee" within the meaning of the Act. The General Counsel contends, however, and the Respondent denies, that the Respondent's refusal

to hire Cody in a rank and file job on and after November 16, 1948, constituted discrimination in violation of Section 8 (a) (3) of the Act.

B. The Facts

Before and after his promotion to the assistant foremanship in February, 1948, Cody was recognized as a good, capable worker. He was also very active in the Oil Workers which he joined in 1934. In 1941 he took successive leaves of absence from his work for the Respondent for a continuous period of approximately 18 months to serve as an international representative of the Oil Workers. Sometime after his return to work for the Respondent, and for an unspecified period ending with his promotion to assistant foreman in February, 1948, he served Local 128 as the chairman of its Texas Company unit, participated in that Local's contract negotiations with the Respondent, was one of the signers for the Oil Workers of the resulting contracts in 1947, including the contract covering the refinery and pipeline employees, and handled grievances under that contract, first with Superintendent Dreyer and Assistant Superintendent Jones, and then, when necessary, also at higher levels. When he was promoted to become assistant foreman, Cody secured a withdrawal card from the Oil Workers at the request of Superintendent Dreyer.

Cody was on vacation from August 23 to September 12, 1948. Four or five days before he was to return to work, he telephoned Assistant Superintendent Jones and was told that there was a strike. Cody

laughed and said it looked as if he could have some more vacation. Jones told him, however, that he should come back to work on Monday, September 13, because the Respondent had a picket line pass for him from the Oil Workers to do maintenance, safety, and patrol work.

Cody, receiving his pass, patrolled the Respondent's lines and checked its pump stations, and made reports to Superintendent Dreyer from September 13 to September 28, inclusive. On several occasions he noticed that oil was being pumped through the lines and on one occasion he asked Letson, the foreman, what was going on but Letson said he did not know.

On Thursday, September 21, according to Cody's testimony, Chief Dispatcher Evans, referring to papers which he held in his hand, told Cody "that these strappings⁵³ [have] to be delivered" to the office, and Cody answered that Evans "could depend that [Cody] wasn't going to take them for him." On the following day, Evans told Cody that certain run tickets had to be delivered to the office and placed them on Cody's desk. Cody, however, left them on his desk and started on his patrol. When he returned they

⁵³ A strapping is a table, specially prepared for each of the oil tanks, for converting into barrels the linear measurement of the difference between high and low gauges shown on a run ticket. Run tickets are reports which are ordinarily made out by gaugers and which show the temperature and the high and low gauges on a change in level of a tank, e.g., on a shipment from a tank. Both run tickets and strapings are normally delivered to the office.

were gone. In his testimony Cody gave no reason for not delivering the run tickets but said that he had refused to deliver the strappings on the preceding day "because the strappings that are sent out to the various companies . . . are to show on the run tickets as to how much oil was shipped from a tank. I wanted no part in the operation."

Cody was injured in an automobile accident on Thursday, September 23, and Assistant Superintendent Jones excused him from work from Saturday, September 25, through Tuesday, September 28. On Monday, however, Assistant Superintendent Jones telephoned Cody to return to work on Tuesday, September 28, and on that day Cody reported to Jones' office.

Jones thereupon told Cody "that the Respondent had changed their minds now," that they were going to start up operations and that in lengthened, overtime schedules, the men were to ride in pairs, with Huso, a junior engineer, as Cody's partner. Jones also told Cody that Cody was to gauge and sample three tanks at the Yorba Linda Pumping Station sometime before October 1, for a "first of the month report."⁵⁴ Cody objected to gauging and sampling,

⁵⁴ Jones gave no testimony concerning this conversation; the findings with respect thereto are based upon Cody's testimony. Although Cody testified on direct examination that Jones also told him "to get the [Yorba Linda Pumping] Station to run," he modified his testimony on cross-examination by saying that this statement was made to him, not by Jones, but by Superintendent Dreyer who later appeared and joined in the conversation.

because as he then told Jones, it was work normally done by nonsupervisory employees. He also reminded Jones of his long service on the Union's committees since 1933 and said that he had "an actual fear of what would happen to [his] family and [his] home because of [his] activities in the Union."

During this conversation between Jones and Cody, Superintendent Dreyer entered Jones' office. Jones told Dreyer that Cody "didn't see fit" to do the work assigned to him and asked what should be done about it. Cody repeated what he had told Jones and then, when Dreyer said he must perform his assignment, he asked Dreyer "if he couldn't call [his] partner and let him do the work." Dreyer answered that it would not be fair to do that, and that if Cody "couldn't do the work," they would have to discharge him. Cody then told Dreyer "he would have to give the order," whereupon Dreyer said that he wanted Cody to gauge and sample the Yorba Linda tanks and "get the station ready to run."⁵⁵ Cody refused, and was discharged.

On the same day, Cody secured the cancellation of his withdrawal card from the Oil Workers and addressed a meeting of the Respondent's striking employees. Thereafter, he made trips to other locals of the Oil Workers to secure strike contributions and spent most of the rest of his time at the office of

⁵⁵ The finding as to this particular statement by Dreyer is based upon Cody's testimony in spite of Dreyer's denial. Otherwise the findings as to this conversation are based upon the consistent testimony of Dreyer and Cody.

Local 128. He also addressed a meeting of striking employees of the Standard Oil Company. Since November 22, 1948, he has been employed "on and off" by Local 128.

Beginning with November 4, Cody made a series of attempts, first to regain his job as assistant foreman and then, on and after November 16, to secure employment with the Respondent in a rank-and-file job.

On November 4, Cody asked E. B. O'Connor, manager of the Respondent's Pipe-line Department in the Pacific Coast Division to be reinstated. He agreed with O'Connor that he had made a mistake as a foreman but said he did not understand why he could not return to work as had the rest of the employees. O'Connor said that, in view of the circumstances of his discharge, Cody had to make his peace with Superintendent Dreyer before he could be rehired and made an appointment for Cody to see Dreyer.

On November 8, Cody met Superintendent Dreyer at the pipe-line headquarters in the Los Angeles Refinery Works near Wilmington. Cody asked that he be returned to his job as a supervisor, stating that it had been difficult for him to decide not to do the work assigned to him and that, at O'Connor's suggestion, he had come to see Dreyer to "make amends." In the discussion, Dreyer asked whether Cody, if returned to a supervisor's job, would go through the picket lines at certain points on the Company's properties and those of the Richfield Oil Company and the Union Oil Company. Cody said that he thought it was awfully unfair to ask that of him and that

his answer was that he could not do it on September 28, and he still could not do it. Dreyer told Cody that he would consider Cody's request for reinstatement and would give Cody an answer within a week. On November 11, Dreyer called Cody on the telephone and told Cody that his decision was still the same as it was on September 28 and that he wished Cody much success in finding a job elsewhere.

On Monday, November 15, Cody told O'Connor of his visit to Dreyer and Dreyer's answer. O'Connor said that he thought, from a conversation he had with Dreyer, that perhaps Cody had been "a little bit too cocky," when he asked Dreyer for his job back. O'Connor also asked Cody whether he was sure he wanted to work for The Texas Company and upon Cody's affirmative answer, O'Connor said, "My reasons for asking that I think you have a lot to contribute to organized labor. Maybe you should make your career out of that." Cody said that a representative has no home life. O'Connor asked what Cody wanted him to do. Upon Cody's suggestion of his meeting with both O'Connor and Dreyer at the same time, O'Connor refused, stating that he thought Cody himself should make amends with Dreyer. Cody said he recognized O'Connor's position. O'Connor said in substance that he could order Dreyer to put Cody back to work but that he did not think that was the right thing to do—that he thought Cody should make amends with Dreyer. At Cody's request O'Connor made another appointment for Cody to see Dreyer on November 16.

On November 16, Cody again saw Superintendent

Dreyer and told him that, as a foreman, he had probably made some mistakes but that now he was asking for "any job." He also told Dreyer in substance that he thought it was an excessive penalty to discharge a man like him with such long service with the Company and referred to other cases in which employees had been merely demoted. Dreyer told Cody that he thought Cody's act "was a premeditated act, that if it had been something . . . done on the impulse of a moment, he might be able to excuse it." At the end of their conversation, Dreyer said that he would consider the matter and give Cody an answer later. On November 19, Dreyer telephoned Cody and told him that his decision was still the same as it was on September 28 and that he again wished Cody much success in finding employment elsewhere.

On receiving Dreyer's telephone call on November 19, Cody again appealed to O'Connor by telephone, stating that he was getting "double talk" from Dreyer and asked that O'Connor arrange to meet both Dreyer and Cody. O'Connor said he was not satisfied with Dreyer's answers to Cody and would telephone to Cody about the matter later on.

Not hearing from O'Connor, Cody wrote him a letter on December 16, 1948, and then visited him after January 1, 1949. O'Connor again told Cody to make amends with Dreyer and also suggested getting Cody a foreign job through the Respondent's refinery superintendent. But Cody said to hold that possibility in abeyance because he was going to do all he could to get a job in the pipe-line department.

On February 1 or February 2, 1949, Cody saw

Dreyer for the last time and was told by Dreyer in effect that the matter of Cody's application for work and Dreyer's reasons for refusal had been fully discussed and was ended.

C. CONCLUSIONS

The General Counsel argues that the Respondent's refusal on and after November 16 to hire Cody in a rank-and-file job was based upon his "excessive loyalty" to the Oil Workers; the Respondent argues that its refusal was based upon Cody's improper refusal as a supervisor to perform work assigned to him by the Respondent when he thought it adversely affected the interests of the Oil Workers and the strikers and his insistence at the same time that he be permitted to continue as a supervisor in the performance of other functions. Regardless of approach, the critical point of disagreement is whether the Respondent refused to hire Cody in a rank-and-file job in order "to discourage membership in a labor organization" (i.e., the Oil Workers), within the meaning of, and in violation of, Section 8 (a) (3), of the Act.

Although Cody was extremely active and prominent in the Oil Workers' activities both before his promotion to the assistant foremanship and after his discharge, the evidence does not persuade the undersigned that his membership in, and aggressive support of, the Oil Workers, or the prospect of his resuming these activities in a rank-and-file job, was the reason for the Respondent's refusal to permit Cody to return as a rank-and-file employee. There

was never any interference by the Respondent with these activities on Cody's part nor any indication that it was disturbed by his long and effective service for the Unions. On the contrary, the Respondent promoted him and made him a supervisor.

On the other hand, upon the evidence, it seems clear that the real reason for the Respondent's refusal to permit Cody to return to work as a rank-and-file employee was the same as the reason for which he was discharged as an assistant foreman; namely, that, as an assistant foreman, he had improperly refused to perform services because, in his opinion, they would help the Respondent and injure the chances of the strikers in the strike contest. In cases of this sort, supervisors, not being employees but representatives of the employer, may be expected by the employer to assist him in resisting the strike by continuing his business during and in spite of the strike. Thus, an employer's discharge of a supervisor because of a refusal by him to render this assistance (unless it be a refusal to participate in an unfair labor practice or to commit other unlawful acts), cannot be said to have as its objective or necessary result, the discouragement of membership in the striking union.

Nor can a subsequent refusal by the employer for the same reason, to hire the erstwhile supervisor as a rank-and-file employee be regarded as discouraging membership in a union. For it is based neither upon the membership of the former supervisor in a union nor any protected activities on his part on be-

half of the union in question. On the contrary, it rests solely upon his unprotected, prior refusal as a supervisor to align himself with his employer rather than with the striking employees, in the employer's legitimate contest of the strike.

The undersigned finds, therefore, that the Respondent, by refusing to reemploy George Cody as a rank-and-file employee did not discriminate with regard to his hire and tenure of employment, in order to discourage membership in a labor organization, in violation of Section 8 (a) (3) of the Act.

* * * * *

CONCLUSIONS OF LAW

5. The Respondent did not discriminatorily refuse to employ George Cody to discourage membership in a labor organization.

* * * * *

Affidavits and Return Receipts attached.

Before The National Labor Relations Board
Twenty-First Region

Case No. 21-CA-295

In the Matter of:

THE TEXAS COMPANY and ROBERT R.
RISSMAN

Case No. 21-CA-375

In the Matter of:

THE TEXAS COMPANY and GEORGE
CODY

Suite 607-613, Hearing Room 2

111 West Seventh St., Los Angeles, Calif.

Wednesday, October 26, 1949

Pursuant to notice, the above-entitled matter
came on for hearing at 10:30 a.m.

Before:

William F. Scharnikow, Trial Examiner.

Appearances:

Charles K. Hackler and Eugene M. Purver, 111
West Seventh St., Los Angeles, Calif., ap-
pearing for General Counsel.

J. A. McNair, Charles M. Brooks and Wallace
E. Avery, 929 South Broadway, Los An-
geles, Calif., appearing for the The Texas
Company. [1*]

* * * * *

PROCEEDINGS

Mr. Hackler: Mr. Examiner, I have had marked
by the official reporter for identification the follow-

* Page numbering appearing at foot of page of original certified
Reporter's Transcript.

ing formal documents, which constitute the pleadings in these cases:

* * * * *

General Counsel's Exhibit 1-E, which is the First Amended Charge filed by George Cody in Case No. 21-CA-375, being filed on the 17th day of March, 1949; [5]

* * * * *

General Counsel's Exhibit 1-FF, which is the First Amended Consolidated Complaint, dated October 18, 1949. On the reverse side of the last page of this Amended Consolidated Complaint there is endorsed a receipt indicating that a copy of it was received by counsel for Respondent on the 18th day of October, 1949.

* * * * *

General Counsel's Exhibit 1-HH, which is a verified Answer of the Respondent to the First Amended Consolidated Complaint, filed on October 24, 1949, and to which are attached three Affidavits of Service, indicating service by registered mail on Cody, Rissman, and Armin on the 24th of October, 1949;

General Counsel's Exhibit 1-II, which is a Motion to Dismiss the First Amended Consolidated Complaint, filed on October 24, 1949, and bearing attached affidavits showing registered mail service of a copy of such Motion to Dismiss on October 24th upon Armin, Cody, and Rissman.

The foregoing documents, which have been identified as General Counsel's Exhibits 1-A through 1-II, inclusive, are [12] herewith offered as the formal documents in the case.

Trial Examiner Scharnikow: Any objection?

Mr. Brooks: No objection.

Trial Examiner Scharnikow: General Counsel's Exhibits 1-A through 1-II are admitted in evidence.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-II for identification were received in evidence.) [13]

[Printer's Note: Exhibit No. 1-E is set out in full at page 1, Exhibit 1-FF at page 4, Exhibit 1-HH at page 9, 1-II at page 14 of this printed record.]

* * * * *

Mr. Hackler: I have had marked for identification General Counsel's Exhibit 13, what purports to be a typewritten copy of a strike settlement agreement under date of November 4, 1948, which purports to cover and affect the "Refining Department (Pacific Coast Division) of The Texas Company," the signatories on the copy being Mr. B. O'Connor, signing for "The Texas Company, Refining Department (Pacific Coast Division)", and bearing the signatures of E. Carl Mattern for the Oilworkers International Union and C. P. Myers on behalf of Long Beach Local No. 128. Can it be stipulated that General Counsel's Exhibit 13 is a true and correct copy of [53] the original strike settlement agreement entered into by the parties who appear signatories here on the date mentioned?

Mr. Brooks: So stipulated.

Mr. Hackler: In view of the stipulation, I offer General Counsel's Exhibit 13.

Mr. Brooks: No objection.

Trial Examiner Scharnikow: General Counsel's Exhibit 13 is admitted in evidence.

(The document heretofore marked as General Counsel's Exhibit 13 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT NO. 13

STRIKE SETTLEMENT AGREEMENT

This Agreement dated November 4th, 1948, outlines the basis of settlement of the strike called on September 4, 1948, by the Oil Workers International Union and its Locals 120 and 128 (hereinafter called "Union") against the Refining Department (Pacific Coast Division) of The Texas Company (hereinafter called Refining Department).

1. The Refining Department agrees that the rates of pay in effect at its Los Angeles Works and Los Angeles Terminal, its Fillmore Works, its Pipe Line Division and its Los Angeles Package Terminal as of September 3, 1948, shall be increased by twelve and one-half ($12\frac{1}{2}$) cents per hour for each hourly rate classification and that the monthly salaried rates in effect September 3, 1948, in the Los Angeles Works office, Los Angeles Package Terminal office and in the Pipe Line Division shall be increased Twenty-One and One-half Dollars (\$21.50) per month, said increases to become effective upon the date of execution of new Agreements between the Refining De-

partment and the Union referred to in paragraph 4 herein.

2. The Union agrees to terminate the current strike and will withdraw all pickets upon the execution of the new Agreements referred to in paragraph 4 herein.

3. The Refining Department agrees it will schedule its employes to return to work in the job classifications each occupied on September 3, 1948, such schedules to provide for return to work in an orderly manner consistent with good operations, and to permit all employes to be at work within 5 working days after the execution of the new Agreements referred to in paragraph 4 herein.

Any employe scheduled and notified to return to work and who does not return within fifteen (15) consecutive days after such notification, shall, unless there are extenuating and justifiable circumstances, be considered as having terminated his service with the Refining Department.

4. That new Agreements will be executed between the Refining Department and the Union covering—

- (a) Los Angeles Works and Los Angeles Terminal (Plant)
- (b) Los Angeles Package Terminal (Plant)
- (c) Los Angeles Package Terminal (Office)
- (d) Pipe Line Division
- (e) Fillmore Works.

and such Agreements shall become effective on date of execution.

5. The Refining Department will not prosecute the pending lawsuit heretofore filed against the Un-

ion or its members or institute any such new lawsuits for any alleged damage to the Refining Department or its employes arising out of the current strike and the Union will not prosecute its pending unfair labor practice charges or institute any new unfair labor practice charges against the Refining Department or its employes arising out of the current strike.

THE TEXAS COMPANY,
REFINING DEPARTMENT,
(Pacific Coast Division)

By /s/ B. O'CONNOR

OIL WORKERS INTERNATIONAL UNION, C.I.O.

By /s/ E. CARL MATTERN

LONG BEACH LOCAL NO. 128

By /s/ C. P. MYERS.

Trial Examiner Scharnikow: For my information, can you further stipulate as to which of the units of employees as listed General Counsel's Exhibit 13 covers?

Mr. Brooks: None.

Mr. Hackler: It covers none of the three units that we have covered in these contracts here. It covers several bargaining units in the refining department of the company, which I think will be more particularly set forth when Mr. Brooks argues his motion to dismiss.

Mr. Brooks: For further clarification, the only person involved in this proceeding, Mr. Examiner, who worked in the refining department prior to the date of the strike is Mr. Cody. [54]

* * * * *

Mr. Brooks: Of course, first, can it be stipulated that George Cody, named in Paragraph 7 of the Complaint, was a supervisor within the definition of the National Labor Relations Act, as amended, at the time of his discharge, as alleged in the [66] Respondent's Answer?

Mr. Hackler: So stipulated.

Trial Examiner Scharnikow: Was that discharge of Cody alleged in your Answer?

Mr. Brooks: Yes; Paragraph 7.

Mr. Hackler: That is in the Answer. The Complaint only alleges a refusal of employment to Cody.

Trial Examiner Scharnikow: All right, Mr. Brooks.

Mr. Brooks: Is that stipulation accepted?

Mr. Hackler: So stipulated.

Trial Examiner Scharnikow: The stipulation is accepted. [67]

* * * * *

Trial Examiner Scharnikow: Well, it was stipulated that Cody was a supervisor.

Mr. Hackler: At the time of his discharge, as alleged [97] in the Answer of the respondent.

Trial Examiner Scharnikow: Yes, but refused reinstatement.

Mr. Hackler: No. The theory of the Complaint, as it shows on its face, that he was refused new employment as a rank and file worker. The company's Answer sets up that, because he had previously been discharged as a foreman that justified a later refusal to hire him in as a rank and file on the Phelps Dodge theory. That is the real issue here.

Trial Examiner Scharnikow: Do you intend to offer proof that the application by Mr. Cody for this new employment was an application specifically for employment as a rank and file employee?

Mr. Hackler: Yes; the Complaint so alleges that he was refused employment.

Trial Examiner Scharnikow: Refused employment. I noticed that.

Mr. Hackler: As a rank and filer, and then by way of Answer it was set up that the reason he was and is refused employment, as I recall the Answer, is the fact that he had been previously discharged during the strike when he was a supervisor. [98] I think the facts will be, without going into the evidence,—I don't know whether the Answer goes that far—that he was discharged as a supervisor because he refused at the company's request to do struck work. In other words, he refused to do, from his standpoint, strike-breaking work.

Trial Examiner Scharnikow: Then, your theory in your intended proof will be the fact he made an application specifically for employment as a rank and file employee?

Mr. Hackler: That is right.

Trial Examiner Scharnikow: And that application was rejected.

Mr. Hackler: The refusal of that was an unfair labor practice. We make no contention that his discharge as a supervisor—that he had any remedies under the statute.

Trial Examiner Scharnikow: Or there was a failure to reinstate him as a supervisor.

Mr. Hackler: No, not alleged or relied upon. You will note Mr. Cody's charge is on the broader theory, that he was discriminated against as a supervisor. That is not the theory of the Complaint. [99]

* * * * *

Mr. Brooks: In the first place, as just has been mentioned, the Charge in the withdrawn case alleges that supervisors in The Texas Company have been discharged. What I have said with respect to the withdrawal of the Charge and other respects would apply in similar respects to that portion of the Complaint contained in Paragraph 7, but the principal position of ourselves regarding the reason that Paragraph 7 should be dismissed on the state of the record at the present time is this:

It is admitted that Cody was a supervisor. The Charge alleges that he was discharged. It makes no difference what reason prompted the discharge in the case of a supervisor. The Congress clearly excluded supervisory people from the coverage of the Act. It said that supervisors are a part of management; they are not employees for the purpose of this law. It is clear from the beginning of the court decisions on this statute and its predecessor that an employer may discharge an employee or a man working for him—I am using this in the broad sense—but an employer may discharge an employee for any reason whatsoever, so long as it doesn't violate the statute. Of course, we have contracts and an employer may not discharge an employee in violation of the contract unless, however, the statute prohibits an employer from discharging the man or a contract pro-

hibits a man from discharging an employee. He may discharge him for any reason, because he is [107] red-headed, freckle-faced, or anything else. That is very clear.

The statute in Section 10(c) goes further, and provides that the Board will not order reinstated or give backpay to any person who has been discharged for cause. What is "for cause"? It is very clear that Congress meant and this Board understand "for cause" to mean a reason which is not protected under the statute. Our position, therefore, is, if we admit that Cody was a supervisor, if we admit that he was discharged, it makes no difference for what reason he was discharged. He was discharged for cause, because it is not protected.

Therefore, if this Board is to order the man reinstated or is to order backpay, it will contravene Section 10(c) of the statute, as well as the entire spirit of the statute. If the Board should order him hired as a brand new employee, then the Board will be doing indirectly what it is prohibited from doing directly.

We recall that in the Phelps Dodge case, first the Wambach Mills case, that the Board held and the courts sustained the authority of the Board to order the employer to hire a person. The basis for that was that that person was an employee. If the Board should attempt to order an employer, order this respondent, to hire a man who had been discharged for cause, it would be violating the spirit, if not the letter, of the [108] statute.

There are numerous cases where the Board has distinguished between protected union activity or protected concerted activity and unprotected activity. Our position is that if a man was a supervisor, then the activity was not protected and he may not therefore be ordered hired or reinstated.

I am not going to burden the record or take the time to argue further that point. I think that our position is quite clear on the state of the record as it is now. There may be many questions that will arise after the evidence develops, but for the purposes of the motion at the present time that generally is our position. [109]

* * * * *

Mr. Hackler: A few words on the Cody case. I think it is probably very clear now, the theory of the Complaint, which is that they discharged Cody, as alleged in the Answer, at the time when he was a supervisory employee for his refusal on management's request to do striker's work, and they argue that at the time of the strike they had a right to discharge him because of this, since the position which Cody held at that time was such as to render him a non-employee under the statute. They say that it did not [149] affect Cody as an individual, since the statutory provision removes supervisors as supervisors from the protection of the Act.

Trial Examiner Scharnikow: I think I understand that pretty well.

Mr. Hackler: You got that.

Now, I do want to cite to you in that connection two cases, the Lily Tulip Cup case, which is an inter-

mediate report, has not reached Board decision, 10-CA-279. In that, substantially the same issues were before Trial Examiner Fitzpatrick with reference to a supervisor.

Another recent case of the Board, Carnegie Illinois Steel Corporation, 13-CA-2799, a Wagner Act case, in which the Board declined to reinstate mechanical supervisors on the narrow ground that they did not refuse—on account of the type of refusal there.

I do want to, I might just as well put this on the record at this time, call attention to the Pinaud case, 54 NLRB 1226—

Trial Examiner Scharnikow: That is on the supervisor point?

Mr. Hackler: Yes, sir. And also the Denver case, 52 NLRB 81, and the cases cited by the Board in that Carnegie case.

The position of the company here is that there is no [150] offer to order reinstatement of this man to a supervisory job, and that the company, because of Section 10 in that respect, has no obligation. The fact that the section appears in the statute is purely a limitation on remedies, because if you notice in the other section it is very different. For example, a man who is a member of an affiliated union or non-affiliated union, it doesn't have any bearing at all if an unfair labor practice was committed. The fact that the Act says you fellows are on your own does not make it unprotected in the sense referred to.

I might point out that it is a very serious matter in the decision along the lines as suggested here might

have some very interesting repercussions. If, for example, the for cause matter precedes the interpretation urged by opposing counsel, it might be interesting to see whether the Trial Examiner or the Board with reference to, for example, agricultural laborers, who are also non-employees in exactly the same manner as a supervisory employee, if he is fired because of joining the union and there is no remedy for him, the same as the supervisor, if that can blackball him when he appears at the gate asking for a different job.

Now, I think it would have very serious effects, a holding of that kind, and I want to get a step farther in saying that if this type of interpretation were made that [151] is urged, if it were afforded the Texas Oil Company legitimate cause to refuse this man new employment, the fact he would not engage in strike breaking work as a supervisor, it would have equally afforded any other company, because if it is just cause for Texas it would be just cause for Standard. They could say, "We will decline you employment because of your misconduct over at Texas." I don't see how that would be escaped. You would have a device by which a man would be permanently black-listed the rest of his life in any given industry if he made the mistake of supporting a rank and file union. I don't think Congress intended that. I say, if there is such a decision, the rank and file people in this company will think a long time before they will take an upgrading to a supervisory job if that sort of choice would be made to them.

When they remove themselves, or are removed, from supervisory jobs, they can't even get back in the ranks unless they completely repudiate their union. I don't think you will find in the legislative statute any statute on the part of Congress to destroy or discourage union activities by supervision. [152]

* * * * *

Mr. Brooks: I would like to make one final mention of this Cody case. As I said, I don't want to burden this record now with these arguments. It should be noted that Section 10(c) doesn't say that the Board is prohibited from reinstating any employee who was discharged for cause; it says any individual, uses the word "individual."

Now, Mr. Hackler says that the Act eliminating supervisors doesn't effect Mr. Cody as an individual. We say that if he was discharged for cause, as they admit he was because he has no recourse, then, that is for cause. Then we say they can't order him reinstated. He says they are not asking for reinstatement; they are asking for employment. I believe that the word "reinstatement" means to put the man to work again.

Now, I would like to inquire through the Examiner, are they asking for any back pay?

Mr. Hackler: Certainly, and I might say apropos that the use of that word "individual," while it is our contention that the unfair labor practice was the refusal of rank and file employment to him is a matter of remedy, the Board might, in my judgment, at least, not only order him hired as a rank and file worker, but under that section might properly,

if they deem to effectuate the policies of the Act, actually order him reinstated to the supervisory job as a matter of remedy with the [155] appropriate back pay order in either instance, not because he was fired from the supervisory job, but to remove the effects of the unfair labor practices from the minds of the employees, the rank and file employees, as arising from the refusal to hire him at the gate as a rank and filer, a clear indication to them that union activities—in other words, to restore the status quo as to him as a remedial device for the benefit of the rank and file employees.

Mr. Brooks: Then when Congress removed supervisory and specifically made them a part of management, the whole Act of Congress was a farce. [156]

* * * * *

ALFRED GEORGE CODY

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Purver): What is your full name, sir? A. Alfred George Cody.

Q. What is your address?

A. 2768 Main Avenue, Long Beach, California.

Q. Are you presently employed?

A. Yes, sir. [195]

Q. By whom?

A. By the Oil Workers International Union, Local 128.

Q. How long have you been employed by Local 128?

(Testimony of Alfred George Cody.)

A. Been employed off and on since November 22, 1948.

Q. Did you ever work for The Texas Company?

A. Yes, sir.

Q. When did you first work for The Texas Company?

A. Started to work for them on April the 6th, 1928.

Q. In what capacity? A. As a laborer.

Q. Did you have any other jobs with The Texas Company?

A. Yes, sir. I had many jobs in the Pipeline Division.

Q. Will you describe them to us, and how long you were on each one?

A. I worked in the labor gang something like three weeks, and was promoted to pumper No. 1; worked in that capacity at different stations for The Texas Company, in the LA Basin Area, until about 1941, at which time I took a leave of absence to serve as an International representative for this union.

Q. How long? A. Eighteen months.

Q. Then did you go back to The Texas Company?

A. Yes, sir.

Q. In what capacity? [196]

A. As a pumper.

Trial Examiner Scharnikow: Is there any difference between a pumper and a pumper No. 1?

Q. (By Mr. Purver): Mr. Cody, can you tell him?

(Testimony of Alfred George Cody.)

A. Yes, they have classifications, pumper No. 1 and pumper No. 2. I am talking about pumper No. 1.

Trial Examiner Scharnikow: When you came back you were pumper No. 1 again?

The Witness: Yes.

Q. (By Mr. Purver): Do you know whether the company has a policy of making an award of any sort after twenty years of service?

A. Yes. They award you with a 20-year service pin, and I also received a letter from the vice-president of The Texas Company in charge of refineries.

Mr. Purver: I ask that the reporter mark for identification, as General Counsel's Exhibit 18, what purports to be a copy of the letter referred to by the witness.

(The document referred to was marked General Counsel's Exhibit No. 18 for identification.)

Mr. Purver: Will the parties stipulate that that is a true and accurate copy thereof?

Mr. Brooks: Mr. Examiner, I am unable, for lack of knowledge, to stipulate that this is a true and correct copy of the one the witness received; but I will stipulate it is [197] the practice of the company to write this kind of letters when the employee has been with the company for twenty years.

Trial Examiner Scharnikow: Do you accept the stipulation?

Mr. Purver: At this point I will ask the reporter to mark the original, instead of the copy.

(Testimony of Alfred George Cody.)

Mr. Brooks: Is that stipulated, that it is the practice of the company?

Mr. Purver: To send letters; but not exactly the same kind. There are different letters sent to different people after twenty years of service.

Mr. Brooks: Letters of commendation, signed by the appropriate vice-president.

Mr. Purver: Yes.

Mark this the same number.

(The document referred to was marked General Counsel's Exhibit No. 18 for identification.)

* * * * *

Q. (By Mr. Purver): I hand you what has been marked for identification as General Counsel's Exhibit 18, and ask you if that is the original that you received on or about April 1, 1948?

A. It is. [198]

Mr. Purver: I now offer in evidence General Counsel's Exhibit 18.

Trial Examiner Scharnikow: Any objection?

Mr. Brooks: No objection.

Trial Examiner Scharnikow: General Counsel's Exhibit 18 is admitted in evidence.

(The document heretofore marked General Counsel's Exhibit No. 18 for identification, was received in evidence.) [199]

(Testimony of Alfred George Cody.)

GENERAL COUNSEL'S EXHIBIT No. 18

True Copy

The Texas Company
135 E. 42nd St., New York 17, N. Y.

M. Halpern
Vice President

April 1, 1948

Mr. George Cody
2768 Maine Avenue
Long Beach 6, Calif.

Dear Mr. Cody:

I am pleased to note that you will complete twenty years of continuous service with The Texas Company on April 6th, and I wish to offer my congratulations on this occasion.

Management sincerely appreciates your long service and the satisfactory manner in which you have handled your assignments. It is gratifying to learn from Mr. Dreyer of your ability, initiative and willingness to always satisfactorily perform all work assigned. Such an enviable record must be a great source of personal satisfaction to you.

Trusting that you will enjoy many more years with us and with kind regards, I am

Sincerely yours,

/s/ M. Halpern, Vice President

MH:MCK

[Cancelled Registered Envelope attached]: Ad-

(Testimony of Alfred George Cody.)

dressed to Mr. C. O. Moore, 1708 Gardena, Long Beach, California. Registered No. 93745.

Mr. Purver: I now ask leave to substitute a copy thereof.

Mr. Brooks: No objection.

Trial Examiner Scharnikow: The copy may be submitted for General Counsel's Exhibit 18, as General Counsel's Exhibit 18.

I have something that may be helpful on this problem. Am I correct in my understanding, from the pleadings and the various statements of counsel, that it is undisputed that this man was discharged on September 28, 1948, because, as a supervisor, he either absented himself from work during the strike or actively joined in the strike? Is that so?

Mr. Brooks: Not exactly as stated, your Honor.

Mr. Hackler: We concede he was discharged—I assume you have the correct date, but the evidence will show the circumstances under which he was discharged.

Mr. Brooks: Yes. It was that he was discharged for refusing to perform work.

Mr. Hackler: The extent of our stipulation is that he was discharged, and that he was a supervisor when he was discharged.

Rather than take some conclusionary statement, like, "refusing to work," or refusing to do "scrub work," I prefer that the evidence describe that.

Mr. Brooks: Of course, we will stipulate that he was [200] a good employee for 20 years, if that is the

(Testimony of Alfred George Cody.)

purpose of this. I am not objecting to it. But it may get a little bit burdensome if they go through 20 or 21 years of service.

Mr. Hackler: I think you will stipulate he was a good employee as far as you were concerned, up to the occasion he was discharged?

Mr. Brooks: I might even stipulate, Mr. Hackler, he was a good employee after that time.

Mr. Hackler: All right, let's do that. So stipulated.

Trial Examiner Scharnikow: Do I have such a stipulation?

Mr. Brooks: No, sir. I am afraid somebody might draw the wrong conclusion. [201]

* * * * *

Q. (By Mr. Purver): What is the job that you had immediately prior to the time that you received the letter, which is now in evidence as General Counsel's Exhibit 18?

A. It was assistant district foreman of the Pacific Coast Pipeline.

Q. When were you made assistant district foreman of the Pacific Coast Pipeline?

A. My job was made effective as of February 1st, the pay end of it.

Q. 1948? [202]

A. Yes. But the time I went on the job physically was on February 15, 1948.

Q. And what was the job you had immediately prior thereto? A. A field gauger.

Q. How long did you have that job?

(Testimony of Alfred George Cody.)

A. About two years.

Q. As assistant foreman, did you participate in any grievance committees? A. No.

Q. Did you sit in on any grievance committees after you were notified that you were being made assistant foreman? A. No, sir.

Q. And now, did you go on vacation?

A. Yes, I did.

Q. In 1948? A. Yes, sir. [203]

Q. Now, what time of the year?

A. August 23, 1948, to and including August 12—or September 12, 1948.

Q. When you came back, did you go right back to your job?

A. When I came back from vacation, I called Mr. Jones, either on Thursday or Friday, the 8th or 9th, and told him that I was back and would be ready to work Monday. He told me that there was some trouble. I asked him what the trouble was, and he said that there was a strike on. I laughed and told him it looked like I could have some more vacation.

He said no, that the company had a pass for me and that I could come back to work Monday.

Mr. Purver: At this time I would like to ask the reporter to mark for identification as General Counsel's Exhibit 19 a little document.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 19 for identification.)

(Testimony of Alfred George Cody.)

Q. (By Mr. Purver): I will ask you, Mr. Cody, what this is.

A. This is a pass that was brought to my house by Mr. Letson.

Q. Who is Mr. Letson?

A. He is district foreman, was the district foreman directly over me, was brought to my house and given to my wife, and on Saturday, I believe, either Friday or Saturday, September 10 or 11, I am not too sure.

Mr. Purver: I now offer in evidence General Counsel's [204] Exhibit 19.

Mr. Brooks: May we see it?

Mr. Purver: Please.

Mr. Brooks: Did you offer that?

Mr. Purver: I am offering it now, yes.

Mr. Brooks: We have no objection.

Trial Examiner Scharnikow: General Counsel's Exhibit No. 19 is admitted in evidence.

(The document heretofore marked General Counsel's Exhibit No. 19 for identification was received in evidence.)

GENERAL COUNSEL EXHIBIT No. 19

PICKET LINE PASS

Date Sept. 6, 1948

Long Beach Local 128, O.W.I.U.-CIO

Pass G. Cody through picket line from Sept. 13
to

Signed Herbert S. Bean

(Testimony of Alfred George Cody.)

Q. (By Mr. Purver): Was that pass ever revoked?

A. No, sir, not to my knowledge.

Q. Or called in? A. Not to my knowledge.

Q. You still have it, in other words?

A. Yes, sir.

Q. Mr. Cody, you started working for The Texas Company over 20 years ago? A. Yes, sir.

Q. Did you ever join a union?

A. Yes, I first joined the Employees Association.

Q. When was that? A. In 1933.

Q. Did you hold any office in it?

A. Yes, sir. [205]

Q. What office?

A. Chairman of the Workmen's Committee in The Texas Company, Pipeline Division.

Q. For the Employees Association?

A. Yes, sir.

* * * * *

Mr. Hackler: Can it be stipulated that it was a labor organization?

Mr. Brooks: We will stipulate that it was a labor organization as defined by the National Labor Relations Act of 1935. However, that act was not in existence in 1933.

Mr. Purver: That is the reason for the question. He didn't say there was a labor organization.

Mr. Brooks: If the National Labor Relations Act had been in effect in 1933 as it was until 1947, I assume he would have been a member of a labor organization. We will stipulate [206] to that.

(Testimony of Alfred George Cody.)

Mr. Purver: So stipulated.

Q. (By Mr. Purver): As such an official of the association, did you come in contact and deal with members of management? A. Yes, sir.

Q. When did you join the Oil Worker's Union?

A. 1934.

Q. Did you notify the company of that?

A. I didn't see any reason to.

Mr. Brooks: I move to strike the answer as non-responsive.

Trial Examiner Scharnikow: I will strike the answer.

Let me ask the question now. Did you notify the company? Did you or did you not?

The Witness: Well, in this way, there was a meeting in the—trying to think of the name of the hotel.

Mr. Brooks: What did you say, Mr. Cody?

Trial Examiner Scharnikow: He is trying to think of the name of the hotel.

The Witness: I can't think of it. It was in Long Beach. At the time management was there and a group of employees, and I asked management if there was any objections, Mr. Holmes was, I believe, then the top guy in the manufacturing end, if there was any objections to a person belonging to the Oil Workers Union and being a member of this committee. He said there were no objections. [207]

Mr. Brooks: Mr. Examiner, I hate to interrupt, but so we can have him identified, at this time could

(Testimony of Alfred George Cody.)

we ask the witness who Mr. Holmes was? He said Mr. Holmes said that.

Trial Examiner Scharnikow: Yes. He said he was the top production man at the time.

The Witness: No, manufacturing.

Trial Examiner Scharnikow: Top manufacturing man.

Mr. Brooks: All right. I didn't hear that. I am sorry.

Q. (By Mr. Purver): When did you take time out to act for the Oil Workers Union?

A. You mean my first leave of absence?

Q. Yes, sir.

A. It started some time in 1941 and I came back to work in time to take a vacation before the first of 1943.

Q. Did you take any other leaves of absence?

A. Only to attend conventions and things of that sort, no long periods.

Q. Now, where did you work for The Texas Company, what area?

A. What is known generally as the L. A. Basin Area. [208]

* * * * *

Q. (By Mr. Purver): When was the last time, Mr. Cody, that you took leave to attend to union business?

A. In August, 1947, to attend the Oil Workers Convention in Kansas City.

Q. Now, will you describe how you came back from vacation, tell me what was your first assign-

(Testimony of Alfred George Cody.)

ment after you returned from your vacation in 1948, in September?

A. I returned, as stated, called up, and Mr. Jones told me about the strike, and told me that he had a pass for me and had sent that pass over to the house. During vacation times the company takes the car away from you that they furnish you, and he told me I could come into the refinery and pick up both the pass and the car.

I told him I didn't want to do that, that I thought he should bring it out to me, and they did. They delivered my car out to Los Alamitos headquarters of the pipeline and sent Mr. Letson over to my house with the pass.

Q. Do you know of your own knowledge how the company acquired that pass?

A. No, the only thing I know is what happened in the past, and I imagine that is the same thing that happened this time, but I don't know that.

Mr. Purver: Can we stipulate as to how the pass system was set up?

Mr. Brooks: In the refining department, pipeline [217] division?

Mr. Purver: Yes.

Mr. Brooks: We can try.

Trial Examiner Scharnikow: Off the record.

(Discussion off the record.)

Trial Examiner Scharnikow: On the record.

Mr. Brooks: Mr. Examiner, I will state the situa-

(Testimony of Alfred George Cody.)

tion with respect to the passes, as I understand it to have been at that time.

Shortly after the strike began the union, through the local workmen's committee for the respective locations, worked out with the local management an arrangement whereby passes would be made out and signed by the local workmen's committee, a member of the local workmen's committee, to individuals, which passes would permit the individuals to come through the picket line without any kind of question on the part of the pickets or the union.

Mr. Hackler: As far as I know that is correct. I can't say for certain whether in each instance in each bargaining unit that arrangement was made after 12:01 midnight of the 4th, or whether in some instances such an arrangement had been arrived at with the local management or by somebody before that, prior to the actual appearance of the pickets.

Mr. Brooks: I accept that exception.

Mr. Purver: So stipulated. [218]

Trial Examiner Scharnikow: Just so that I understand it, Mr. Cody, your last leave of absence on union business was in August, 1947, for the Kansas City Convention?

The Witness: Yes, sir.

Trial Examiner Scharnikow: Then you went on and you testified about getting a pass and having your company car delivered to your home. Was that in September of 1948 or '47?

The Witness: September, 1948.

(Testimony of Alfred George Cody.)

Mr. Purver: You see, the witness early in 1948 became a supervisory employee.

Trial Examiner Scharnikow: I just thought the witness had slipped in the year he gave, that is all. Incidentally, if I may——

Mr. Purver: Please.

Trial Examiner Scharnikow: In September, 1948, what plant were you working at as a supervisory employee?

The Witness: Pipeline division.

Trial Examiner Scharnikow: Pipeline division, and where is that?

The Witness: The headquarters for the pipeline division is L. A. Works Refinery, just east of Alameda Boulevard on Highway 101.

Trial Examiner Scharnikow: Will you show that to me on General Counsel's Exhibit 20, please? That is in——

The Witness: That is in Wilmington. [219]

Trial Examiner Scharnikow: That is included at least within the Signal Hill Headquarters as shown on this map, is it?

The Witness: No, it is over in here. Here it is, right here.

Trial Examiner Scharnikow: Did you work out of the Signal Hill Headquarters?

The Witness: No, I worked out of the L. A. Works Refinery.

Mr. Brooks: The refinery is not indicated on the map.

The Witness: Yes, it is.

(Testimony of Alfred George Cody.)

Mr. Brooks: The L. A. Works is the refinery, and is not included in this proceeding.

The Witness: They have it marked here "Texas Company Refinery."

Mr. Brooks: Oh, I am sorry. Maybe it does show that.

Mr. Hackler: It is not one of the red marks.

Mr. Brooks: That is right. It is not one of the red marks. It is shown just northeast of Wilmington.

Trial Examiner Scharnikow: It is shown just southwest of the Signal Hill Headquarters and just northeast of Wilmington, is that correct?

Mr. Avery: That is right.

Trial Examiner Scharnikow: And were the employees whom you supervised in one of the units covered by the union contract?

The Witness: Yes. [220]

Trial Examiner Scharnikow: And which of the three contracts, General Counsel's Exhibits 2, 3 and 4?

The Witness: None of these.

Trial Examiner Scharnikow: None of those. All right. If I may, maybe you can answer this question for me: Were the employees supervised by this man in the unit, in the refining unit covered by that stipulation?

Mr. Hackler: They were.

Trial Examiner Scharnikow: Can we stipulate on that?

Mr. Brooks: Yes, sir.

Q. (By Mr. Purver): You then received your

(Testimony of Alfred George Cody.)

pass and the automobile at the same time, is that it?

A. One one day, and went out and picked up the car the next day.

Q. What was the job you were assigned to?

A. I was told to do patrol work.

Trial Examiner Scharnikow: What kind of work?

The Witness: Patrol work. That meant to ride the lines and check the various pump stations in the L. A. Basin area, to work from 12:00 midnight until 8:00 a.m. At that time I would be relieved by another person at Los Alamitos headquarters.

Q. (By Mr. Purver): Had you done that sort of work before? A. No, sir.

Q. What work had you done before as a supervisor? [221]

A. My general work was to make schedules for the various operations, such as the pump stations, field gaugers, break in people on various jobs in the pipeline division from the line-riding job to the field-gauging jobs. I broke them in with other employees and checked to see that their work was progressing, and that was the line of my work.

Q. Now, had you done various sorts of jobs within the pipeline division prior to your being made a supervisor? A. Yes, sir.

Q. In the course of those years, ever been assigned to patrol pipeline? A. No, sir.

Q. Either as supervisor or nonsupervisor?

A. No, sir, only partially as a gauger. It is part of the gauger's duty to look after the lines in his area.

(Testimony of Alfred George Cody.)

Q. That is, as a nonsupervisory employee?

A. Yes, sir.

Q. Did you perform the assignment given to you of patrolling the pipelines? A. I did.

Q. For how long? A. Until I was canned.

Trial Examiner Scharnikow: Until what?

The Witness: Until I was discharged.

Q. (By Mr. Purver): Describe the circumstances of your [222] discharge?

A. The first week I didn't have any—the week that I was working from 12:00 midnight until 8:00 a.m. there didn't anything happen. The next week I was scheduled on from 8:00 to 4:00, that is, 8:00 a.m. to 4 p.m., Monday through Thursday, and Friday afternoon I was scheduled to work 4:00 p.m. to 12:00 midnight. On Tuesday of that week there was some strappings, that is, measurements on tanks that were to be delivered to some parts.

The next day there were some run tickets that were to be delivered to some parts, and I was not asked directly to take them; they were put on my desk and I just forgot to take them.

On Thursday of that week, Thursday afternoon, around quitting time I had a little bit of time left and was covering a very bad strip of road that our main pipeline ran along on 29th and California, and there was an accident between a Long Beach policeman who was off duty and the car that I was driving, or the company car.

I was taken to the hospital and determined that there wasn't any fracture, and reported the next afternoon for work as scheduled. Mr. Jones then gave

(Testimony of Alfred George Cody.)

me Saturday, Sunday, Monday and Tuesday off.

Q. May I interrupt you to ask you who Mr. Jones was?

A. Mr. Jones is the assistant superintendent, and I was [223] home during this time nursing this shoulder, and received a telephone call Monday to report at noon to Mr. Jones.

Q. What Monday is that? What date is that? Can you fix that date?

A. The date was Monday the 27th, then I was to come back on Tuesday at noon of the 28th.

Q. Go ahead.

A. I didn't know exactly what I was being called in for, didn't know whether it had something to do with the accident or some other things, but when I got in there and got in Mr. Jones' office, I got in early, he told me that the company had changed their mind now, that they were going to start up operations, that they were going to put the employees on 12 hours a day six days a week and pay them time and a half for 32 hours, and said that we were going to begin riding now in pairs, and he assigned another man to go with me, and I have been trying for three weeks to think of the guy's name.

He was a junior engineer who worked for the company, and I can't place his name.

He told me the job that he wanted me to do was to go over to the Yorba Linda pumping station and gauge and sample the tanks—there are three of them—and get that station prepared to run.

I went into a great length to tell him that I had been a member of this union for years and years,

(Testimony of Alfred George Cody.)

that they knew that [224] I had served on the workmen's committee for or as a representative of the employees ever since 1933, with the exceptions of the times that I was on leaves of absence as an international representative for this union, told them that I had also served on a committee in the Harbor where the Commie element during certain periods were very bad, told them that I had worked very hard in this union, to keep this kind of thing out of our union, told them also that I had built a room on the back of my house and had paid cash for it and I didn't have too much dough.

By about the time I got through telling Mr. Jones all of this, Mr. Dreyer, who was walking through the hall of the office——

Q. Who?

A. Mr. Dreyer, the superintendent, was walking by, and Mr. Jones waved him in. He told Mr. Dreyer that George didn't see fit to do the work that he assigned, and he wanted to know what he was going to do about it.

Q. By George you are referring to yourself?

A. That is right.

Mr. Brooks: We will stipulate Mr. Dreyer is E. L. Dreyer.

Mr. Purver: So stipulated.

Mr. Brooks: And Mr. Jones who has been referred to is F. A. Jones.

The Witness: I went through about the same conversation with Mr. Dreyer in Mr. Jones' presence as I had with Mr. Jones. He told me that that was the

(Testimony of Alfred George Cody.)

assignment that I had to do. I [225] asked him if I couldn't haul this other person and let him do the work, and he said no, that wouldn't be fair, to send the guy in Long Beach to do the work and not the other; if I couldn't do the work that they would have to discharge me.

I told him that he would have to give the order, and he did, and I refused to do work back of the picket line.

Mr. Jones——

Q. (By Mr. Purver): Just a moment, please. Who normally did the gauging and sampling work that you were asked to do?

A. In this particular instance, the pumpers No. 1.

Q. A category covered by the contract?

A. Yes, sir.

Q. Work done by nonsupervisory employees, in other words? A. Yes, sir.

Mr. Purver: I think it would be well to clarify the record by saying that at that time there was a contract, but that contract is not in evidence and we do not intend to put it in evidence at this time.

Mr. Brooks: That is correct. [226]

Mr. Brooks: To maintain my absolute honesty, Mr. Examiner, the contract had expired on that particular date, but there was a contract that had expired——

Mr. Purver: That had been covered prior to that.

Mr. Brooks: Yes. You know me.

Mr. Purver: With that understanding, I rephrase my statement.

(Testimony of Alfred George Cody.)

Q. (By Mr. Purver): Mr. Cody, in the course of your conversation you just described at some length, you described what you told Mr. Jones as to your activity in the union? A. Yes, sir.

Q. Now, you have merely testified so far as to what he told you. Now, are the things that you told him the things you actually did and activities in which you actually took part? A. Yes, sir.

Q. Now, will you go on?

A. As Mr. Dreyer left the office, Mr. Jones followed him out and told me to set there a few minutes.

First, I should say Mr. Jones asked Mr. Dreyer what he meant by that.

Q. Tell me, what time of the day was this?

A. This was around noon.

Mr. Dreyer said that "He," meaning me, would have [227] to take his chances along with the rest of the strikers; and he turned to walk away, and I thanked him, after 21 years of service.

Mr. Dreyer walked out, and Mr. Jones followed him. As he left, he told me to wait a few minutes, and came back in and told me if I would wait at the office until 4:30 they would have my time made out in full.

I told him I was discharged at that time. If they didn't trust me to drive the car home, they could get someone to take me home. At that time they got Richard Hight to drive me home.

Q. Mr. Cody, I hand you what is in evidence as General Counsel's Exhibit 2, and ask you whether that represents, on page 37, the written name, signed

(Testimony of Alfred George Cody.)

“George Cody, Chairman, Negotiating Committee,”
represents your signature? A. Yes, sir.

Q. Did you take part in those negotiations?

A. All of them.

Q. All of them, you mean, covering what contract, sir?

A. All of them covering all the contracts for that year.

Q. That was the year of 1947? A. Yes, sir.

Q. You have now brought us home, Mr. Cody; is that correct? You then went home that afternoon, is that correct?

A. Went home and told my wife I had been discharged. [228]

* * * * *

Trial Examiner Scharnikow: I will overrule the objection, Mr. Brooks, and admit General Counsel's Exhibit 22 in evidence.

(The document heretofore marked General Counsel's Exhibit No. 22 for identification was received in evidence.) [240]

GENERAL COUNSEL'S EXHIBIT No. 22

Constitution and By-Laws of the Oil Workers International Union—1949

* * * * *

Withdrawal Cards

Section 5. When a member leaves the jurisdiction of the International Union he may take a withdrawal

(Testimony of Alfred George Cody.)

card providing he has paid all fines, assessments, and dues for the current month in which the request for withdrawal card is made.

When a member in good standing is promoted to a position outside the jurisdiction of the Local collective bargaining unit in effect at the plant where he is working (this does not mean outside the jurisdiction of a local agreement in effect at a plant only, but all employees effected and within the bargaining agency) he will be issued an honorable withdrawal card upon request, provided he has paid dues, all fines, assessments, and Dues for the current month in which the request is made.

Any member holding a withdrawal card who again resumes work within the jurisdiction of the International Union shall pay the current month's dues to the Local in whose jurisdiction he is employed. A member depositing withdrawal card with a Local Union may be accepted upon receiving a majority vote of members present at a regular meeting.

Any member who fails to deposit his withdrawal card within ten (10) days after resuming work, with the Secretary of the Local shall be subject to revocation of such withdrawal card and his membership shall be subject to reinstatement rules as provided in the Local By-Laws as if no withdrawal card had been issued.

* * * * *

Mr. Hackler: I wish to show, and I am not arguing all my inferences in connection with a routine offer of documents, clearly that the man at the time

(Testimony of Alfred George Cody.)

he took the supervisory job—and we hope to show that all times after that the policy of this company as reduced to writing in two collective bargaining agreements, and quite aside from those agreements, the hiatus period between them, that it had a policy that men promoted to supervisory status, who, for any reason, didn't do the job to the satisfaction of management, had a right to demotion, to their former job, with full seniority, including the seniority time when they were in the supervisory category.

With reference to the withdrawal cards, we will show by the Constitution the practice, and these contracts, that it was the practice for these men to take withdrawal cards and reinstate their full membership if they went back down. Do you say that that doesn't have anything to do with motivation based on the situation this man testified to yesterday, and that that motivation won't carry over into the refusal of employment later at the gate? I understand it will be argued from the respondent's standpoint that it wasn't because he was a strong man and supported the strike that they were motivated, but "We just don't like disobedient people around."

That will be argued ad nauseam in this case, and that there was another route this company could have followed if it had been worried about union activities.

We have not changed the theory of the Complaint in any respect. We feel that we ought to be able to show evidence on this motive issue, and as I have

(Testimony of Alfred George Cody.)

said before, as to any of these documents, if the questioning of the witnesses shows that these are not material, not relevant, or not entitled to any weight, or that the inferences that we have that are unwarranted, nobody is hurt.

Trial Examiner Scharnikow: I think we ought to consider General Counsel's Exhibit No. 24.

Mr. Brooks: May I make one observation with respect to the last comments of Mr. Hackler? He stated that the company should have demoted the man. If we violated the law there, that is not charged in the Complaint. The first date on which we are alleged to have violated the law with respect to Cody is November 16th.

Now, if they are charging here that, we are beginning to get somewhere, I see now what his purpose is here, but I say [252] that that is beyond the Complaint.

Mr. Hackler: I think my statement was clear that there isn't any charge——

Trial Examiner Scharnikow: We started to consider Exhibits 22, 23 and 24 separately. What about 24?

Mr. Hackler: Exhibit 24, Mr. Examiner, the relevant portion of that is Article 7 and the chart in the back of the book. Article 7 provides the effect of seniority on promotion. It clearly shows, it does in the document and we intend to tie it down by evidence, that contract is now in force.

If the Board ordered this man reinstated or put on a job in a non-supervisory category with his

(Testimony of Alfred George Cody.)

seniority accumulated with this company, the argument has been advanced here that he would automatically progress up and be a supervisor again, so that we are attempting to do indirectly what, in Mr. Brooks' view, we couldn't do directly, namely, reinstate the man as a supervisor.

That contract now in force indicates what effect putting this man on a non-supervisory job would have and the effect of it would be that his line of promotional progression shown by the chart on the last page stopped short of supervisory status.

Mr. Brooks: Mr. Examiner, in the first place, counsel has misquoted. We have made no contention that if this witness [253] is ordered employed, as the Complaint says, that he would automatically go up to a supervisor by the practices or by the contract or by anything else that the company follows.

We argued that the Board, the General Counsel, was seeking to do indirectly what is prohibited, what it is prohibited from doing directly, in that counsel for the General Counsel stated that they were seeking the man's employment as a new employee, and he was answering my argument that 10-C said you cannot reinstate him.

Now, if this man is employed pursuant to the order of the Board, it is our position that he would go in as a brand new employee just like we had never seen him before. I would like to ask in that connection to determine whether further objection on the materiality of this document, whether counsel is contending that the remedy should be an order of employ-

(Testimony of Alfred George Cody.)

ment with all of his past seniority or past service credits.

Mr. Hackler: I think I straightened that out yesterday. In our view, the company on the date of November 16th, or whenever it was, was under an obligation to employ this man as a new employee at the gate, or the Phelps-Dodge theory. Having refused to do so, as to what will remedy that refusal is up to the Board, of course. As far as remedy, that is, removing the effects of that refusal, it might be the Board would say to completely remedy it [254] in the minds of the employees, the remedy would go beyond what the obligation was on the day he appeared there and was ordered put on the job with his seniority. I don't maintain there was obligation to take him that day with his twenty some years seniority.

Trial Examiner Scharnikow: What Mr. Brooks put to you is whether or not when he appeared and asked for employment on November 16th, whether or not the company should have regarded him as an applicant.

Mr. Hackler: That's right.

Trial Examiner Scharnikow: With seniority rights. Am I putting this fairly, Mr. Brooks?

Mr. Brooks: That is one of the questions in my mind.

Trial Examiner Scharnikow: Let's get that first.

Mr. Brooks: Whether or not the company at that time was obligated in the counsel's mind to hire the man and give him credit for his past service. That

(Testimony of Alfred George Cody.)

is the first question, whether the company was obligated.

Trial Examiner Scharnikow: It is possible that Mr. Hackler may argue that the right of this man of employment was bulwarked by his seniority rights by past contracts as contained in General Counsel's Exhibit No. 24. Is that your position?

Mr. Hackler: Well, not in exactly those words. I contend, and I think it is reasonably simple, that this company [255] had a duty to employ this man at or about the time he applied for a non-supervisory job.

Now, Mr. Brooks tells me, "do I go further"? Do I go further and say he had some further duty to accord him his seniority rights at the gate? I say no. Had the company hired him that day and put him on the job as they would a stranger, there would have been no unfair labor practice in my view. At least, this proceeding wouldn't be here. He wants me to go ahead further and say in remedying that activity that the Board should not do more than order the company to do that, and not go further and correct his seniority. The two are distinct.

Trial Examiner Scharnikow: You pointed out in General Counsel's Exhibit 23 for identification that there is a provision to the effect that a supervisor proving incapable of performing the supervisory duties is entitled to go back and take a rank and file job with his seniority.

Now, the question put by Mr. Brooks, so far as I see it, is whether or not you contend that when this

(Testimony of Alfred George Cody.)

man, having been discharged as a supervisor in September, came back in November and asked for employment as a rank and file employee he was entitled not only to the considerations given to a completely new applicant for employment, but also to the consideration of the accumulated seniority to which he would be entitled if General Counsel's Exhibit 23 were still [256] in effect.

Mr. Hackler: Not so contended. As I said earlier, the offer goes to motive, both then and later. I don't contend—you may note from the charge filed in this case, Mr. Examiner, that it was couched on the theory that this man, when he was discharged, that when the company asked him to do non-supervisory work, that he became a rank and file employee or in a non-supervisory position, and that as such he had the protections of the Act at that time.

The Complaint is not under that theory. It isn't on a theory that there was a duty to demote at that time and that it was an unfair labor practice to fail to demote, nor is it on the theory that when he came back later he, in effect, asked for a demotion under the contract. That isn't our theory.

Our theory remains the Phelps-Dodge theory. These are evidentiary, going to two theories, what was the motive of refusing employment at the gate, and (2), what is the remedy, assuming it was an unfair labor practice to refuse him. The remedy might well go beyond, as I have suggested, the duty that existed at the time.

Mr. Brooks: Mr. Examiner, this is rather funda-

(Testimony of Alfred George Cody.)

mental. In the first place, taking that last statement, does counsel contend that the Board can go beyond the allegations in the Complaint? The allegations in the Complaint are [257] that we refused to employ the man on November 16, 1948.

Now, counsel is indicating that this proposed document is material in order to show to the effect that the company should give, and since it did not give effect to his past seniority, then the Board should order us to give effect to that past seniority. That goes beyond the Complaint. If this Complaint is meritorious in Paragraph 7 regarding Mr. Cody, it is meritorious regardless of how long the man worked for the company. It is meritorious only because General Counsel will have established that the company refused to employ this man on November 16th and thereafter because of union activities, and to discourage membership in a labor organization in violation of 8 (a) (3) interferes with the rights of them under 8 (a) (1).

I still don't know whether General Counsel expects us to meet the proposition that this man would be entitled to reinstatement with back pay beyond November 16th or whether or not counsel is contending we violated the law by refusing to demote on September 28th. If he is not contending we violated the law by not demoting him on September 28th, then this is not material. If he is contending that we violated the law at that time, he is going beyond the Complaint.

* * * * *

(Testimony of Alfred George Cody.)

Trial Examiner Scharnikow: I think it is pretty well shaken down in my mind, but I want to make sure. This is my understanding so far of your argument. You contend, Mr. Hackler, that there are two reasons why General Counsel's Exhibits 23 and 24 are material: First, on the motive question relative to discrimination, and secondly, on the extent of the remedy which will be granted. [259]

Mr. Hackler: Correct.

Mr. Brooks: May I hear the last part of that statement again, please? Will you read it?

(The record was read.)

Trial Examiner Scharnikow: On the motive question, I understand, too, that your contention with reference to Mr. Cody is that he presented himself as an ordinary applicant for employment in November, that he was not entitled to any more consideration by the respondent of his application than any completely new applicant for employment.

Mr. Hackler: That's right.

Trial Examiner Scharnikow: Was not, according to your contention, the respondent was not required to consider any possibility that under the existing contracts—that is, previous contracts and the contract just recently executed on November 4th—that he was entitled to his seniority which would give him a stronger claim to employment than if he had been a complete stranger to the company.

Do you want that read back?

Mr. Hackler: Yes.

(The record was read.)

(Testimony of Alfred George Cody.)

Mr. Hackler: I am not contending that there was a contractual obligation to employ him, but as any other stranger at the gate in assessing whether the company will [260] hire him or not, they will consider any relevant facts concerning the individuals. For example, his previous length of service with that company, his ability to do the work, the circumstances under which he left before.

The fact that under collective bargaining agreement in force at the time he applies for a job, that as to other people there is an obligation to straight seniority as an important factor in hiring, and that sort of thing. In other words, I don't want to say when you use the expression, Mr. Examiner, they were not required to consider certain factors. I don't go for that. I say the company should have considered in the case of Cody, as in the case of any other applicant, any relevant factors in his work history, the past employment practices, the past promotion and demotion practices of that company as evidenced not only by collective bargaining agreements but their custom and practice as going to their motivation.

I don't want the record to suggest here that in looking at the man Cody across the table as an applicant for employment that I am agreeing that he could just as well have been John Jones, who had never worked for the company, or that the company should disregard its contracts and practices with reference to employments and demotions and promotions in the past. I think you must see his applica-

(Testimony of Alfred George Cody.)

tion in the light of employing and promoting practices and [261] demoting practices.

In that connection, we will have evidence as to how these were applied to other supervisors, other supervisors than Cody, as all going to motive.

I am not going to say that this company was under obligation under that contract so that Cody could walk in and lay the contract down and say, "Now, under this contract I have got a job and, if you don't give it to me, you have breached the contract." That isn't our contention. It is our contention that the contractual relationship before and after his discharge are relevant factors going to their motive as to why they turned him away from employment.[262]

* * * * *

Trial Examiner Scharnikow: What Mr. Hackler is now saying in essence, as I understand it, is that even though respondent was not obligated to follow the seniority terms of these contracts with respect to Cody, nevertheless, in a similar and identical situation it follows the substance of those provisions as a matter of practice, while not obligated to do so, it did so in practice.

Mr. Hackler: Yes.

Trial Examiner Scharnikow: Now, of course, it gets to be a pretty close question—I think the discussion has served to limit the Board's position on it. The result of [263] this discussion, the result is that there is no contention that there was a contract obligation to accord the seniority rights to this man as a new employee.

(Testimony of Alfred George Cody.)

Mr. Hackler: That is correct.

Trial Examiner Scharnikow: I have an offer of General Counsel's Exhibits 23 and 24?

Mr. Hackler: Yes.

Trial Examiner Scharnikow: And I have heard your objections and your arguments. I am going to admit General Counsel's Exhibits 23 and 24, in the light of the discussion between counsel, and particularly Mr. Hackler's exposition of the General Counsel's theory.

(The documents heretofore marked General Counsel's Exhibits Nos. 23 and 24 for identification were received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 23

Article VII—Seniority

A. Employees shall have overall Pipe Line Division seniority.

* * * * *

H. When there are no qualified employes with Pipe Line Division seniority, Craftsmen may be hired as such for maintenance and construction work and, if they have been in the employ of the Pipe Line Division for a period of at least one-hundred and twenty (120) consecutive days, they will be subject to demotion from that classification or layoff in the inverse order of their Pipe Line Division seniority.

* * * * *

K. The Company will, for the information of all employes, post a chart indicating the regular steps

(Testimony of Alfred George Cody.)

of promotion and will furnish copies to Long Beach Local No. 128 and to the Workmen's Committee.

* * * * *

M. An employe incapable of performing the duties of a job to which he has been promoted shall not lose his rights to return to the job from which he was promoted, nor his seniority rights to promotion to some job which he is capable of performing.

GENERAL COUNSEL'S EXHIBIT No. 24

Article VII

Promotions, Reduction of Forces, Seniority

A. Promotion to any job vacancy shall be the exclusive function of the Company. In making promotions the Company, in addition to seniority, will consider the following requisites; namely, an employe's ability and efficiency, his past record with the Company, his experience, his willingness to work, his ability to carry out instructions, and his physical fitness. When the above requisites are relatively equal, the senior qualified employe will be promoted.

* * * * *

H. An employe incapable of performing the duties of a job to which he has been promoted shall not lose his right to the job from which he was promoted nor his seniority rights to promotion to some job for which he is capable.

* * * * *

K. An employe who is transferred—

(Testimony of Alfred George Cody.)

(1) for the purpose of training, or

(2) is promoted to a supervisory capacity, or

(3) is loaned to any other property of the Company or its affiliates temporarily,

shall continue to accumulate seniority in the Pipe Line Division and upon his return will be reinstated therein with the same seniority as he would have been entitled to had he not been so transferred.

* * * * *

M. If an employe becomes incapable of performing his regular work through accident, sickness, or other cause, the Company will, if suitable work is available, provide such work as the employe is capable of performing, if another employe is not thereby laid off or reduced in rate of pay. If on account of illness or temporary physical incapacity, an employe is absent or temporarily engaged in light work, the time spent during such absence or in such temporary employment will contribute towards his Pipe Line Division seniority, but such time shall not be permitted to give such employe seniority advantage over any other employe who at the time such absence or light work began had greater seniority in said Division.

* * * * *

Q. (By Mr. Purver): Mr. Cody, immediately prior to the time you were promoted to a supervisory position in 1948, were you an officer of Local 128? [264]

A. I was.

Q. What position did you hold?

A. Chairman of the Texas Company unit, which

(Testimony of Alfred George Cody.)

made me a member of the Executive Board of Local 128.

Q. Now, by "Texas Company unit," what do you mean?

Mr. Brooks: Mr. Examiner, we will stipulate that by "Texas Company unit" he means what the Exhibit 22 shows it to mean.

We will stipulate that he signed these agreements, where it shows he signed them. The purpose of making this statement, I might say, is a desire to be helpful, and that we might expedite the hearing.

Mr. Purver: I accept the stipulation, and express my gratitude for anything that helps expedite this proceeding.

Q. (By Mr. Purver): Now, you testified that you have taken various leaves of absence for union matters. I direct your attention to General Counsel's Exhibit 23.

Mr. Purver: Mr. Brooks, do you care to stipulate that the leaves of absence that were taken by this witness were taken in accordance with the leaves of absence section of the contract?

Mr. Brooks: I can't stipulate to that.

Q. (By Mr. Purver): I direct your attention to page 19 of General Counsel's Exhibit 23, Article XI, entitled "Leaves of Absence," and ask you whether the leaves of absence you took were in accordance with Article XI. [265] A. Yes.

Q. Can you tell us whether, while you were unit Chairman, you had anything to do with enforcing

(Testimony of Alfred George Cody.)

this contract, which is General Counsel's Exhibit No. 23? A. Yes.

Q. Were the terms of this contract uniformly carried out? A. Yes.

Trial Examiner Scharnikow: What did you do about enforcing that contract?

The Witness: You are asking me?

Trial Examiner Scharnikow: Yes.

The Witness: I was meeting—we had grievances under the contract, and I met with the local management to adjust the grievances, and, if we couldn't adjust it on that level, took it to the higher level.

Trial Examiner Scharnikow: Who were the men from the company whom you saw on these grievances?

The Witness: Generally, in what I call the local level or lower level, was Mr. E. L. Dreyer, superintendent, and Mr. F. A. Jones, and any others that were in there—there were other foremen, I should say, that were in there that weren't the same all the time, but generally those people were there.

Q. (By Mr. Purver): I now direct your attention to Article [266] V on page 12 of General Counsel's Exhibit No. 22, Section 5, entitled "Withdrawal Cards."

When you were made a supervisor, did you, in accordance with Section 5 of this Constitution and By-Laws, obtain a withdrawal card? A. I did.

Q. What were the circumstances of your securing such a card?

A. In conversation with Mr. Dreyer, after I was

(Testimony of Alfred George Cody.)

given the job, he told me that I should get a withdrawal card. I applied for the withdrawal card, and the company still deducted my dues in March, and he again called it to my attention that my dues were still being deducted, and I had to write a letter to the girl over at the L.A. Works office to get her to stop payment of dues, because I already had a withdrawal card. [267]

* * * * *

Q. (By Mr. Purver): Where did you get the pass?

A. The pass was delivered to my home, by Mr. Letson.

Q. How did you come to receive that pass?

A. After I came back off my vacation, I called Mr. Jones, who was my immediate supervisor, and he told me he had a pass for me to do maintenance and safety work and patrol work on the pipeline properties.

Mr. Brooks: I move to strike the answer regarding the purpose for which the pass was granted, on the grounds that no foundation was laid regarding the time and place and the persons present at this conversation.

Trial Examiner Scharnikow: I will overrule the objection, subject to laying a foundation.

Q. (By Mr. Purver): When did you talk with Mr. Jones regarding the pass?

A. Either Thursday or Friday of September—I believe it was the 8th or 9th, 1948.

Q. Do you remember the day you came back from your vacation, what date it was? [276]

(Testimony of Alfred George Cody.)

A. I came back home around the 8th of September.

Q. When did you call Mr. Jones?

A. Either Friday or Saturday; I am not too positive of the date.

Q. A day or two later? A. Yes.

Q. Can you tell us exactly what words Mr. Jones used? A. Yes.

Q. Tell us the conversation.

A. It was by telephone. I called him and told him that I was back and ready to go to work Monday, and he told me that they were having some trouble.

I asked him what the trouble was, and he said there was a strike on. I kiddingly said, "It looks like I can have a longer vacation." He said no, that they had a pass for me to work, and explained to me what the work would be.

Trial Examiner Scharnikow: What did he tell you the work would be?

The Witness: He told me the work would consist of patrolling the pipeline or pumping stations of the company for the purpose of safety.

Q. (By Mr. Purver): Is that the sort of work that you had done immediately prior to your leaving on vacation? A. No.

Q. Did you do that work Mr. Jones asked you to do at that [277] time? A. Yes, sir.

Q. For how long did you do it?

A. Until September 28th.

Trial Examiner Scharnikow: If I may interject just a second, is this the understanding that you told

(Testimony of Alfred George Cody.)

us about having with Jones as to the work you were to do under the pass? You just told us that?

The Witness: Yes.

Trial Examiner Scharnikow: This is the understanding that you spoke about before?

The Witness: Yes.

Q. (By Mr. Purver): Now, will you describe what work you actually did in patrolling the pipeline, from the time that you went back to work on or about September 9th or 10th until September 28th, or until the time of your accident?

A. Yes. Generally my work was to patrol the pipelines,—

Q. Did you patrol the pipelines? A. I did.

Q. How?

A. By automobile—to check on the gates on the various pump stations in the L. A. Basin area, and call in every so often to a dispatcher; and to keep a log book on what I found in my travels around the pipelines and stations, and to keep a record of any leaks that I might find; checking valve boxes [278] to see that there weren't any gates open that were supposed to be closed; and just such things as that.

Q. Was there any oil being pumped through those lines at that time? A. Yes.

Q. Did you report that? A. Yes.

* * * * *

Q. (By Mr. Purver): In all of the lines, did you find oil being pumped through? A. No.

Q. On how many occasions did you find oil was being pumped through the line?

(Testimony of Alfred George Cody.)

A. Once at the Los Alamitos pumping station, and once in Huntington Beach.

Q. And what did you do about it, exactly, in each case?

A. Reported it to the dispatcher.

Q. What is the name of the dispatcher in each case?

A. I don't believe I can answer that.

Q. Is that recorded in your log book?

A. I believe so. [279]

Q. It would give the exact date of each call, is that it? A. Yes.

Q. What did the dispatcher answer to you on each occasion that you said that you found oil running through the lines?

A. In the first instance, the Los Alamitos, he said according to his records there wasn't any pump on the line.

Q. And on the second occasion?

A. That was at Huntington Beach, where another gauger was on top of one of our leases, gauging the oil. I didn't know why he was there, and my foreman directly over me, Mr. Letson, was in the field, and I asked him what was going on; and he said that he didn't know. But that oil was shipped on that day from that tank to some other oil company, and I don't know who. [280]

* * * * *

Q. (By Mr. Purver): Aside from the two instances you found oil was being pumped, did you find that oil was being pumped through the line?

(Testimony of Alfred George Cody.)

A. No, except that I did report a number of tank gates on different leases being opened and the seals being broken, that I couldn't account for, because there wasn't any gauger working.

* * * * *

Q. (By Mr. Purver): Now, as a supervisor, Mr. Cody, exactly what categories of men worked under you? A. Line rider,—

Trial Examiner Scharnikow: "Line rider," is that right?

The Witness: Yes. —tester No. 2, testers No. 1, pumpers No. 1 and 2, and field gaugers. [281]

Q. (By Mr. Purver): Now, what do line riders do?

A. They ride the line for a given distance, and collect and deliver mail and other small articles.

Q. What do pumpers do?

A. They pump the oil from storage in a pump station, through a main line to the L. A. Works Refinery, or to some other company, if the oil has been sold to another company, or on an exchange. They, on some stations, operate dehydrators, which has to do with cleaning of oil, and fire boilers.

Q. And where are these pumps located?

A. Pumping stations?

Q. Yes. Pumping stations.

A. Yes. One at that time, and still is, located on 28th and Orange. One at Los Alamitos; one at Norwalk; one at what is known as Yorba Linda. [282]

* * * * *

(Testimony of Alfred George Cody.)

Q. (By Mr. Purver): Mr. Cody, what do field gaugers do, that is, field gaugers under you?

A. Field gaugers gauge and sample tanks of oil for shipment from either the Production Department or, in cases of buying from some other companies, make out run tickets which show what the high gauge and low gauge of the tank was; generally shows the barrels—the strappings of the tank will indicate how many barrels were shipped out of high gas and low gas—and see that the tank is sealed off from any incoming oil before they ship it. There is a number seal on the suction that has to be broken and another one put back on after the shipment has been made.

They are to make out and sign a run ticket, and have some one of the producing pumpers or some other company's gauger witness these things are factual.

Q. What does a gauger do physically in gauging?

A. He drops a tape with a plumb bob on the end of it, down into the oil until he can just barely touch the bottom, brings the tape up and reads it for how many feet and inches [285] there are on it, and even eighths of inches in many tanks, and the temperature of the tank, to find out what the temperature on the tank is, then samples the gas.

By sampling it, The Texas Company used a 3-foot barrel sample that they generally sample from the top of the oil to the BS&W level of the oil, which is established by other means.

Q. What do you mean by "BS&W"?

(Testimony of Alfred George Cody.)

A. Bad stuff and water that might be in the oil. [286]

* * * * *

Q. (By Mr. Purver): Between the time you went back to work and September 28, was there any oil pumped through the pipelines that you patrolled?

A. Yes.

Q. Other than the two occasions you mentioned?

A. No. I don't know the answer to that.

Q. How did you know that oil was being pumped on those two occasions?

A. Well, because I heard it in one instance——

Q. Describe what you mean by that.

A. I was at the Los Alamitos pumping station and heard the oil coming over from a pump over into a line leading out into a storage tank in the Los Alamitos pumping station.

Then the other one I saw, because they had the pump on the lease.

Q. Now, the pump that was on, did you see a gauger there? A. Not ours.

Q. Well, did you see a gauger there?

A. Yes. [289]

* * * * *

Q. (By Mr. Purver): Was the gauger a man that worked under you prior to the strike?

A. No, sir.

Q. Had you ever seen him before, that gauger?

A. Yes.

Q. Do you know his name? A. No.

(Testimony of Alfred George Cody.)

Q. Where had you seen him before?

A. At the Huntington Beach lab.

Q. Of that company?

A. I believe it is Cal Tech, I am not sure of that.

Q. From the period you went back to work until September 28, did you have any line riders working under you? A. No.

Q. Any pumpers? A. No.

Q. Testers? A. No.

Q. Field gaugers? A. No.

Q. Now, what is the purpose, if you know, of the pipelines?

A. It is for conveyance of oil from production leases either owned by the company or other companies; it is a gathering system for gathering the oil and transporting that oil, either [290] into storage into the Pipeline Department, or to deliver that same oil to the L. A. Works Refinery for further processing or, on some occasions, they use the lines for transmittal of other companies' oil through our lines, The Texas Company's lines, to various other companies.

Q. Where were these lines located that you were in charge of?

A. In the L. A. Basin Area.

Q. The ones you were in charge of?

A. Yes.

Q. Could you make that any more specific?

A. The main lines run from the refinery south to the Wilmington field, or the properties of the E. B. Hall Company, or better known as the Union

(Testimony of Alfred George Cody.)

Pacific Railroad Company; they go east as far as the Yorba Linda pumping station, or even farther east than that, out to the leases in the Yorba Linda field; they go north to Whittier or Montebello field; and they go west to the Redondo field.

Q. Did you, during September, ride all of these lines?

A. Not all in one night, but covered all of the lines except the Redondo end of them, as rapidly as I could.

Q. Were you in a position to see whether the oil lines were in operation? A. Yes.

Q. Were they in operation during that time?

A. Parts of them were. [291]

Q. Other than the two instances that you testified about? A. No.

Q. Now, in the conveyance of the liquids through the pipe, as you described it, at what time are samples taken?

A. What time are samples taken?

Q. Yes. Prior to, during or after the oil is in the pipeline? A. Before.

Q. Before. And what about tank temperatures?

A. Before.

Q. And what about the securing of the gauges?

A. Before and after.

Trial Examiner Scharnikow: Then all of this would be done at the field end of the pipe?

The Witness: I don't understand.

Trial Examiner Scharnikow: Maybe I am wrong.

(Testimony of Alfred George Cody.)

I understand that these pipes run generally between the refinery and the oil fields?

The Witness: That is right.

Trial Examiner Scharnikow: Now, this sample taking and the temperature taking, is that all done at the field end of the pipe, the oil field end of the pipe?

The Witness: It is done at the place of purchase of the oil.

Trial Examiner Scharnikow: As distinguished from the [292] refinery——

The Witness: Yes.

Trial Examiner Scharnikow: ——or the storage end?

The Witness: Yes.

Q. (By Mr. Purver): In order to do your line riding, did you cross picket lines?

A. The only picket line that I—yes.

Q. Were there pickets at some of these locations?

A. Yes.

Q. That you rode by? A. Yes.

Q. Now, the gauge sampling, taking of tank temperatures, is that done each time before oil is pumped through the line? A. Yes.

Q. That is, as part of the procedure, each time a new batch of oil goes through these processes are carried out? A. Yes.

Q. Now, the Yorba Linda station, what form of power was used to operate the pump?

A. Steam.

(Testimony of Alfred George Cody.)

Q. What would it be necessary to do to prepare that station for pumping oil?

A. At that time, after they had been shut down for 24 or 25 days, you would have to check all of the boilers; and, in order to start pumping, you would have to fire the boilers, [293] and generally get the station ready for operations.

Q. Are there storage tanks at Yorba Linda station? A. Yes.

Q. You testified yesterday that you were ordered to do certain things, which you refused to do. What would you have had to do had you carried out the orders that were given to you on September 28?

A. Gauge and sample the tanks at the Yorba Linda pumping station; and I don't know what they meant by getting the pumping station ready to run. That was a part of the order we didn't even discuss.

Q. You don't know, then, whether it would have included firing of boilers and checking the boilers, do you?

A. No, I didn't discuss that with them, what they meant by it.

Q. To your knowledge, based on your riding the line at that time, was anyone at all working at the Yorba Linda station on the 28th of September?

A. No, not to my knowledge.

Q. Now, on the 28th of September, you had a withdrawal card from the union; is that correct?

A. Yes, sir.

Q. Did you ever return that withdrawal card to your union? A. I did.

(Testimony of Alfred George Cody.)

Q. When? [294]

A. September 28, 1948.

Q. To whom did you return it?

A. To the president of the local union.

Q. What did you do at that time?

A. Deposited my card and put myself in good standing with the union.

Q. Did you get a full membership card then?

A. Yes, sir.

Q. Do you have it with you?

A. My card now?

Q. Your membership card. A. Yes, sir.

Q. Is it the same card that you received on September 28, 1948?

A. No, that is a card that is issued every month when people pay their dues.

Q. It was a card similar to this, is that it?

A. Yes.

Mr. Brooks: May I see the card?

Mr. Purver: Oh, yes; certainly. I do not intend to burden the record by offering that in evidence.

Q. (By Mr. Purver): On the card are the letters "WCD 9-28-48." What does that mean?

A. That my withdrawal card was deposited at this local union on that date. [295]

Trial Examiner Scharnikow: Do you want that identified?

Mr. Brooks: I will stipulate the card shows what Mr. Purver says it does.

Q. (By Mr. Purver): What did you do then?

A. Joined the strikers. [296]

(Testimony of Alfred George Cody.)

Q. Specifically, what did you do?

A. My first job was—the chairman of The Texas Company unit at that time——

Q. Who was that?

A. Odell Clayton.

Trial Examiner Scharnikow: What was that?

(The answer was read.)

The Witness: Clayton came into the union office at 4120 Long Beach Boulevard and asked me if I would address the meeting of The Texas Company unit employees, which was being held that afternoon, September 28, 1948, in the local hall. I told him I would and did.

Q. (By Mr. Purver): You referred to a job. Were you a hired employee of the union at that time?

A. No.

Q. Did you address the membership that evening?

A. That afternoon.

Q. Did you engage in any other activity on behalf of the union thereafter? A. Yes.

Q. What did you do?

A. I helped to maintain the picket lines.

Q. When and where?

A. At all of The Texas Company holdings.

Q. What did you do specifically? Did you walk the line or [297] patrol the line in a car?

A. No, I only walked the picket lines one evening at the refinery.

Q. What did you do to maintain the line?

A. To help maintain the line I made a trip to

(Testimony of Alfred George Cody.)

get funds for the strikers, talking to different locals in the country to get them to contribute moneys to the strikers here in California.

Q. Where did you go?

A. To Port Arthur, Texas, to New Orleans, and the locals that are in those areas.

Q. Who paid the expenses of those trips?

A. The Oil Workers Union. [298]

* * * * *

Q. Do you know whether your speech was published or publicized in the union paper?

A. Yes.

Q. What about your trip to Texas and New Orleans and so on?

A. I don't think that was publicized.

Q. Did you make any other speeches?

A. Yes.

Q. Any in the Los Angeles area? A. Yes.

Q. Where? A. El Segundo Refinery.

Q. Of The Texas Company?

A. Of the Standard Oil Company. [299]

* * * * *

Q. What other activities did you engage in on behalf of the strikers?

A. Well, in many instances—and I have spent all of my time except that time I told you about in speeches, in the local office. Every time a call would come in that there was disruption on the picket lines of any kind of not only The Texas Company, but other companies, I would immediately go out there to see what the trouble was, and if it was something

(Testimony of Alfred George Cody.)

that—something to harm or to create something to harm the employees that were on strike, I did everything I could to get the thing removed.

Q. Did you talk with company officials on any such occasions?

A. After I went out on strike?

Q. Yes, in providing—fixing up troubles on the picket line? A. No.

Q. Did you have any feelings or did you talk with any Texas Company officials during this time?

A. Not until after the strike settlement agreement.

Q. Did you take part in the strike settlement agreement? [300] A. No.

Q. When was the first time you communicated with any Texas Company officials?

A. November 4th, 1948.

Q. And where was that?

A. On the 13th floor of The Texas Company Building.

Q. Where?

A. 929 South Broadway, Los Angeles.

Q. And with whom did you speak?

A. Mr. O'Connor, Mr. B. O. O'Connor.

Mr. Brooks: Mr. Examiner, in order that the record will be clear, we will stipulate that Mr. B. O. O'Connor is Manager, Refining Department, Pacific Coast Division, of The Texas Company.

Mr. Purver: Thank you.

Q. (By Mr. Purver): Describe your conversa-

(Testimony of Alfred George Cody.)

tion with Mr. O'Connor. Tell us first how you came to see Mr. O'Connor.

A. Mr. Carl Mattern, District Director of District No. 3 of the Oil Workers International Union, who was out here to help process the strike, told me at a meeting of The Texas Company unit in which he brought back a proposed settlement of the strike and the contracts for certain groups of the employees for that ratification, he told me that after his meeting with the company that afternoon that he had talked to Mr. O'Connor and Mr. O'Connor—

Trial Examiner Scharnikow: You are not offering it as to the truth of the statement but as to the fact of the statement?

Mr. Purver: That is correct.

Trial Examiner Scharnikow: I will overrule the objection.

Mr. Purver: Merely trying to find out how the witness got to Mr. O'Connor's office.

Mr. Brooks: May I inquire, Mr. Examiner, if it is important in the minds of the General Counsel in regard to the issues of this case as to whether Mr. O'Connor invited him to come to see him?

Mr. Hackler: Usually when you say two people meet, in order to understand it it is well to know whether they passed each other on the sidewalk, whether it was prearranged, what was the purpose, or something of that kind in order to understand it.

Trial Examiner Scharnikow: I understand that what we have so far is for the purpose of showing

(Testimony of Alfred George Cody.)

that Mr. Mattern told the witness that Mr. O'Connor wanted to see him.

Q. (By Mr. Purver): Now, when you saw Mr. O'Connor, what did you say to Mr. O'Connor?

A. I asked him for my job back.

Q. Describe your conversation with Mr. O'Connor.

A. Well, it was quite a lengthy one.

Q. Tell us as concisely as you can. [303]

A. He told me when I first came in that I had made a mistake. I don't think I can remember all of it, but I will remember what I can of it.

I told him that maybe I had made a mistake as a foreman, but that I couldn't see why all the rest of the employees of The Texas Company could go back to work under his management, and that was a true statement—all of them went back to work that wanted to go back to work.

We had a long talk about my work. He told me that he wanted me to know that the thing that I had to settle was with my superintendent, Mr. Dreyer.

He told me that if I was interested, that he would make a date for me to meet Mr. Dreyer and he did make a date with me to meet Mr. Dreyer, and as I was going out the door he patted me on the shoulder and said—prior to that time he told me that I would probably get some kind of a job back; he wasn't sure whether it would be my supervisor's job, whether it would be a job in the gauging department, or whether it would be another supervisor's job in the

(Testimony of Alfred George Cody.)

valley, and as I was leaving—and I know there is much more to this conversation than what I am saying—he patted me on the shoulder and told me not to worry, that I would get a job of some kind.

Q. You referred to a meeting with Mr. Dreyer being arranged. Did you meet with Mr. Dreyer?

A. Yes.

Q. How did you come to meet Mr. Dreyer?

A. By the arrangements that O'Connor made with Mr. Dreyer. He said he was too busy because of just settling the strike to meet me at that time, and set a date for me to meet him Monday, November the 8th.

Q. Did you meet Mr. Dreyer on November 8th?

A. Yes.

Q. Where?

A. At the pipeline headquarters in the Los Angeles Works Refinery.

Q. That is near Wilmington? A. Yes.

Q. And who was present there?

A. Mr. Dreyer and Mr. F. A. Jones.

Mr. Brooks: Mr. Dreyer's title, for the record, is Superintendent, Pipeline Division.

Q. (By Mr. Purver): Will you describe the conversation you had with Mr. Dreyer?

Trial Examiner Scharnikow: Is this a convenient place to break for lunch? It is just 12:00 o'clock now.

Mr. Purver: Yes.

Trial Examiner Scharnikow: We will recess until 1:30.

(Thereupon, a recess was taken until 1:30 o'clock p.m.) [305]

After recess.

(Whereupon, the hearing was resumed, pursuant to the recess, at 1:30 o'clock p.m.)

Trial Examiner Scharnikow: On the record.

GEORGE CODY,

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

Mr. Purver: The last question directed to this witness was to have him describe his conversation with Mr. Dreyer, and the date, I think, was fixed as of——

Trial Examiner Scharnikow: November 8th.

The Witness: In this meeting I asked for my job back as a supervisor and negotiated pretty hard for my job back as a supervisor. There was quite a long discussion. I don't remember in this meeting of Mr. Jones saying anything. Mr. Dreyer done all of the talking, and myself.

Q. (By Mr. Purver): What was the substance of your conversation?

A. About being returned to my job as a supervisor.

Q. Do you remember what you said to Mr. Dreyer?

(Testimony of Alfred George Cody.)

A. Yes, I told him that I just couldn't do the work that he asked me to do and that it was a pretty hard decision for me to make and tell him that I couldn't do the work and that [306] I was there because I had been up to see Mr. O'Connor, and that Mr. O'Connor told me I had to come down and make amends with him.

Q. When you talked about the work that you couldn't do, what work were you referring to?

A. The assignment that they gave me on September 28th.

Q. Proceed. What did Mr. Dreyer say?

A. He didn't have too much to say to me at that particular meeting.

Q. What did he say?

A. He told me that he would think over what I had said and that he would give me an answer.

Q. Just a moment. Was that all to that conversation?

A. No, there was lots more to it, but I don't know anything of value.

Q. Tell us what you remember of that conversation.

A. I can say this, that he asked me—even then there was still parts of this company on strike and the Richfield Oil Company was on strike and the Union Oil Company was on strike—and he asked me that if he did give me a job back as a supervisor, would I go through those picket lines to gauge on oil or perform any duties he might assign me in those plants.

(Testimony of Alfred George Cody.)

I told him I thought that that was awfully unfair to ask that of me, no, I couldn't do it on the 28th and I couldn't do it now. [307]

Q. Was that the substance of the whole conversation? A. I think so.

Q. Now, what were the arrangements that were left between you and Mr. Dreyer?

A. That he would give me an answer within a week.

Q. How?

A. I didn't know how he was going to answer.

Q. Did you, in fact, receive an answer from Mr. Dreyer within a week? A. I did.

Q. How?

A. On the following Thursday——

Q. What date would that be?

A. The 11th, November 11th. I believe it was November 11th.

Q. That is what the calendar shows.

A. In the morning, I received a telephone from Mr. Dreyer. He stated that he was ready to give me his answer.

I asked him what it was. He said that his decision was still the same as it was on September the 28th, and that he wished me much success at finding a job elsewhere.

Q. Did you make any other efforts——

A. I just thanked him and hung up the phone.

Q. Did you make any effort at that time to get employment from Mr. Dreyer?

(Testimony of Alfred George Cody.)

A. At that time? [308]

Q. On the telephone? A. No, sir.

Q. Did you make any effort subsequently to get reemployment or employment at The Texas Company?

A. That very day, I drove up to Los Angeles to see Mr. O'Connor. It was a holiday, and I hadn't even recognized it was one. The office building was closed, and I went over to where the union had set up its headquarters here in Los Angeles, and told Carl Mattern what Mr. Dreyer had said; and he said, "I believe I can do something about it," and he called The Texas Company office and couldn't get Mr. O'Connor in the office.

He called Mr. O'Connor's home, and couldn't get him at home.

He told me to keep on trying to get Mr. O'Connor, and I didn't get in contact with Mr. O'Connor until the following Monday.

Q. Would that be the 15th of November?

A. I believe that is right. Yes.

Q. Did you get in touch with Mr. O'Connor?

A. Yes, by phone, and made an appointment to come up to his office and talk with him.

Q. For when was that appointment?

A. In the morning.

Q. Of what day? [309]

A. November 15th.

Q. Oh, you went to see him the same morning you telephoned? A. Yes.

Q. And did you meet Mr. O'Connor?

(Testimony of Alfred George Cody.)

A. I did.

Q. Where? A. In his office.

Q. That is on Broadway, in Los Angeles?

A. Yes.

Q. And what was the substance of the conversation you had with Mr. O'Connor on the 15th of November?

A. I told him that I had been to see Mr. Dreyer; I told him of Mr. Dreyer's answer to me. And he told me he thought maybe, from his conversation in talking with Mr. Dreyer, that I was a little bit too cocky when I went and asked for my job back.

Q. Was there anybody else present at this conversation? A. No, sir.

Q. Proceed.

A. We had a long discussion again, in which Mr. O'Connor asked me if I was sure that I wanted to work for The Texas Company; and I told him that I was.

He said, "My reasons for asking that are I think you have a lot to contribute to organized labor. Maybe you should make your career out of that." [310]

I told him about the family life of a representative of this union, who actually doesn't have any home life; and he asked me what I wanted him to do, and I asked him if he could make an arrangement so we could both talk across the table with him at the same time, with Mr. Dreyer, myself and he; and he said, no, he thought that this time I should make my amends—I don't know whether that is the word

(Testimony of Alfred George Cody.)

he used or not, but he inferred that—with Mr. Dreyer.

I told him that I recognized the position that he was in. He told me, yes, he knew that he could put me to work; if he so ordered, that Mr. Dreyer would have to put me to work, but he didn't think that was the right way to do. He thought that I could go down and make amends with Mr. Dreyer.

He asked me if I wanted him to make another appointment for me. I said, yes, I would rather have it the other way, but if that was the way he wanted it was good enough for me, and he made another appointment with Mr. Dreyer for me, to meet him the next afternoon, which was the 16th.

I met with Mr. Dreyer on November the 16th.

Q. Where?

A. At the local office on Highway 101 in Wilmington.

Q. Was anybody else present?

A. Mr. F. A. Jones. I approached the matter in an entirely different light and told him then that as a foreman I had [311] probably made some mistakes. I told him that I was there now asking for a job with The Texas Company. I asked him what he meant in our earlier conversation when he made reference to a pump job. He told me that he just picked that out of the sky as a classification, that it could have been laborer or any other classification.

Q. I think at this point it would be well for you to clarify what that has reference to. You said in

(Testimony of Alfred George Cody.)

the prior conversation you were talking about a pumping job?

A. He mentioned the word "pumper" to me in the previous conversation, and I ignored it at that time.

Q. Do I understand you that he offered you a job as a pumper?

A. No. He just mentioned the word "pumper" and I didn't discuss it.

Q. When was that?

A. In the first meeting.

Q. All right, go ahead.

A. After we got through discussing me wanting my job back or a job back, Mr. Dreyer said, "Well, George, if I have to give you an answer today, it will be the same as on September 28th, but I will take it into consideration, the things that you have said to me, and I will give you an answer, and he did answer me.

Q. Did he give you an answer at the time of that conversation? [312]

A. No, sir.

Q. Did Mr. Jones take part in the conversation?

A. He asked me one or two questions and I don't even remember what they were.

Q. Now, can you describe more specifically how you asked for a job, what words you used?

A. I just asked for a job back.

Q. Do you remember what words you used?

A. I asked that, I said I would like to have any job back for The Texas Company, that I was past 40 and had found that at that age you couldn't get

(Testimony of Alfred George Cody.)

jobs as easy as when you were 21 years old, and in fact I hadn't found a place as yet that I could go back to work, and I told him I would certainly like to have a job in the pipe line department.

Q. You didn't specify which job. Is that right?

A. No.

Q. What was Mr. Dreyer's answer?

A. He answered me the following Friday and that was again by telephone.

Q. When you left at the time of November 16th, what was the arrangement as far as your getting an answer was concerned?

A. That he would call me.

Q. At your home? [313]

A. That he would notify me. He didn't say he would call me.

Q. Did he notify you? A. Yes.

Q. Where? Home? A. Yes.

Q. And Friday, that would be the 19th of November. What did he say?

A. He said that his decision was still the same as it was on September 28th and that again wished me much success in finding employment elsewhere.

Q. All these conversations were in good spirits, were they not? There were no arguments?

A. Not as far as I was concerned.

Q. What did you do at that time?

A. I called Mr. O'Connor on the telephone.

Q. When?

A. That same day in the afternoon.

(Testimony of Alfred George Cody.)

Q. What time of day did you get the telephone call from Mr. Dreyer? A. In the morning.

Q. You called Mr. O'Connor in the afternoon?

A. Yes.

Q. What did you say to him?

A. I told him what had happened and asked him if he would [314] make a date again, because I thought he was getting double talk, and the only way he could determine whether he was or not was to talk to both of us across the table. I asked him if he would make a meeting with Dreyer and myself and he said that he would.

Trial Examiner Scharnikow: He said that he would?

The Witness: He said he would.

Q. (By Mr. Purver): Did Mr. O'Connor arrange such a meeting? A. No.

Q. Did you hear from Mr. O'Connor after that conversation on the telephone? A. No.

Q. Was anything else said during the course of that conversation on the phone?

A. There were other things said, but I don't remember all of it.

Q. Do you remember any of it?

A. No, I don't.

Q. Do you remember whether there was any further discussion regarding your request for a job?

A. I asked him if he was satisfied with the answer that Mr. Dreyer gave me, and he told me that he wasn't over the telephone.

Trial Examiner Scharnikow: That he what?

(Testimony of Alfred George Cody.)

The Witness: That he was not. [315]

Q. (By Mr. Purver): Now, how were the arrangements left about making a date for another meeting? A. That he would call me.

Q. Did Mr. O'Connor call you? A. No.

Q. Did you call Mr. O'Connor again?

A. I called his office and found that he had left for New York, and in order to establish a record I wrote to Mr. O'Connor, I wrote him a letter stating all of the things as I understood them and asked him if on his return——

Trial Examiner Scharnikow: Have you a copy of the letter?

Mr. Purver: Yes, sir. I will ask the reporter to mark for identification as General Counsel's Exhibit No. 25 a two-page document which purports to be a copy of a letter dated December 16, 1948, addressed to Mr. B. O. O'Connor, Texas Company, and bearing the original signature of George Cody.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 25 for identification.)

Q. (By Mr. Purver): I hand you what has been marked for identification as General Counsel's Exhibit 25, and ask you whether it is a true copy of the letter that you sent to Mr. O'Connor on December 16, 1948? A. Yes, sir.

Q. Did you ever receive an answer to this letter?

A. No, sir.

(Testimony of Alfred George Cody.)

Mr. Purver: At this time I wish to offer in evidence [316] General Counsel's Exhibit No. 25.

Mr. Brooks: May I examine the witness briefly on voir dire?

Mr. Purver: I have no objection.

Trial Examiner Scharnikow: You may.

Mr. Brooks: Mr. Cody, is this a carbon copy of the letter you wrote to Mr. O'Connor, as you have testified, on December 16th?

The Witness: I don't know whether it is a carbon, or whether it is a copy that was made from a letter.

Mr. Brooks: Do you know——

The Witness: I know it is a true copy of the letter.

Mr. Brooks: Well, how do you know that?

The Witness: Because I was the one that wrote it.

Mr. Brooks: You typed this yourself?

The Witness: No, I had a girl type it.

Mr. Brooks: Well, did you make a carbon copy of the letter you sent to Mr. O'Connor?

The Witness: Yes.

Mr. Brooks: And did you type the letter yourself?

The Witness: No.

Mr. Brooks: Where was it typed?

The Witness: At the local hall.

Mr. Brooks: Do you have a copy of the carbon of the original letter? [317]

The Witness: I can check and see.

Mr. Hackler: I understand——

(Testimony of Alfred George Cody.)

Trial Examiner Scharnikow: Do you want this on the record?

Mr. Hackler: No.

Trial Examiner Scharnikow: Off the record.

(Discussion off the record.)

Trial Examiner Scharnikow: On the record.

Mr. Brooks: Mr. Cody, you have handed me a carbon copy, or what appears to be a carbon copy of a letter, and I have examined it in comparison with the other one, which has now been marked General Counsel's Exhibit 25 for identification. It appears to me that the carbon is a carbon of the one that has now been marked.

Would you agree with that, after examining it? I notice, for example, the last word on each line is identical with the last word on each line of the carbon.

The Witness: Well, I won't say for sure, because I wrote the original—had the original letter written to Mr. O'Connor and kept a copy of it myself, and then had these two copies made for the Board and other people that were interested in my case.

Mr. Brooks: It is your testimony, then, as I understand it, that this letter, which has been marked General Counsel's Exhibit 25 for identification, in the contents is identical [318] with the letter you wrote to Mr. O'Connor on December 16th?

The Witness: Yes.

Mr. Brooks: Even though it is not a carbon copy

(Testimony of Alfred George Cody.)

of the original letter which was mailed; is that right?

The Witness: Yes.

Mr. Purver: I think the record shows that I have already offered General Counsel's Exhibit 25 in evidence.

Mr. Brooks: Mr. Examiner, I do not object to the materiality of the letter. I will not object to it going into evidence, subject to, of course, our checking the files of the company for the original; and then we will, if it is different, put evidence on to that effect and produce the original.

Just to make that clear, I think the foundation is adequate, but I don't want to agree to the statement of facts. I don't think my statement is necessary, but I want to be sure we don't misunderstand each other.

Trial Examiner Scharnikow: Of course, any exhibit is subject to rebuttal.

Mr. Brooks: That is right.

Trial Examiner Scharnikow: You have no objection on the basis of the witness' testimony authenticating this exhibit?

Mr. Brooks: That is right. [319]

Trial Examiner Scharnikow: Or the one sent by him to the company?

Mr. Brooks: That is right.

Trial Examiner Scharnikow: All right. Under the circumstances, I will admit General Counsel's Exhibit 25 in evidence.

(Testimony of Alfred George Cody.)

(The document heretofore marked General Counsel's Exhibit No. 25 marked for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 25

True Copy

2768 Main Avenue
Long Beach, California

Mr. B. O'Connor
The Texas Company
Refining Department
Pacific Coast Division
929 South Broadway
Los Angeles, California

December 16, 1948

Dear Mr. O'Connor:

As you know, for the past few weeks you have had before you the question of my reinstatement with the Company. On November 4, 1948, a strike settlement agreement was executed between the Company and the Oil Workers International Union. On this same day I met with you and you arranged a meeting for me with Superintendent E. L. Dreyer for Monday, November 8, 1948. I met with Mr. Dreyer on that date and we discussed my reinstatement with the Company. Mr. Dreyer informed me that he would give his answer on November 11, 1948.

On November 11, 1948, Mr. Dreyer called me at my home and informed me that he would not reinstate me. I attempted to contact you immediately,

(Testimony of Alfred George Cody.)

but November 11, 1948 was a holiday and I did not reach you until November 15, 1948. At that time, I talked with you, and you again arranged a meeting for me with Mr. Dreyer for the afternoon of November 16, 1948. I met with Mr. Dreyer at that time and he informed me that he would give me his answer on November 19, 1948.

On November 19, 1948, Mr. Dreyer called me and informed me that he would not reinstate me with the Company. I then called you and we discussed the situation over the phone. I informed you of Mr. Dreyer's decision and asked you if that was satisfactory to you. You told me that it was not, and that you would arrange a meeting with yourself, Mr. Dreyer and myself in your office. However, you informed me that Mr. Dreyer was going up North and would not be back until the afternoon of November 24, 1948. Inasmuch as November 25, 1948 was Thanksgiving, you were not sure that you would be able to arrange any meeting for November 26, 1948. You, therefore, said that you would call me after you had succeeded in arranging a meeting.

I did not hear from you, so I called you Tuesday, November 30, 1948. You told me that Mr. Dreyer was coming downtown that day and that you would talk with him and let me know on December 1st or 2nd when we could get together. I received no answer from you, so on Monday, December 6, 1948, I again called your office and was told that you had left for New York and would be back December 21 or 22, 1948.

(Testimony of Alfred George Cody.)

I believe you must realize that this leaves me sort of "hanging in the air". I know that you must be very busy and that pressing matters must have prevented you from arranging the meeting as you told me you would. I appreciate your efforts on my behalf, and hope that the entire matter will be settled in the near future.

Will you kindly call me when you return so that I may know just what my status is.

Respectfully yours,

/s/ GEO. CODY

Q. (By Mr. Purver): You just testified that you received no answer to your letter of December 16th, which is General Counsel's Exhibit 25 in evidence. Did you communicate with Mr. O'Connor thereafter?

A. Yes.

Q. When?

A. Some time after the first of the year.

Q. How long after? A. Soon after.

Q. And how did you communicate with him?

A. By telephone.

Q. Did you get to talk with him?

A. Yes.

Q. And what was the conversation?

A. I made an appointment and met with Mr. O'Connor again.

Q. When was that? [320]

A. Either the next day or within a day or two after I made the telephone appointment.

(Testimony of Alfred George Cody.)

Q. That would be some time in January, 1949?

A. The early part.

Q. Will you give us the substance of that conversation, after telling us where it was and who was present?

A. Mr. O'Connor was the only one present, and it was at his office again, on Broadway, in Los Angeles.

Q. What was the substance of that conversation?

A. I asked him—told him that I didn't understand why I couldn't get a job back. He told me that I had to make amends with my superintendent. He said that I could go see Mr. Dreyer again, that—I would like to have it stated that all of these things are over a year ago, and it is hard to remember all of the different conversations without some kind of notes.

Q. Did you make any notes at that time?

A. Yes, I kept a calendar, with each date that I contacted either Mr. Dreyer or Mr. O'Connor, and have displaced it some place. I had it up to the time I wrote that letter and sometime on after, and might be able to find it. If I can, I can establish those dates on that.

Trial Examiner Scharnikow: Can you hear?

Mr. Brooks: Yes.

Trial Examiner Scharnikow: Speak louder. [321]

Mr. Brooks: Just a moment. Is it planned to produce those notes?

Mr. Purver: The witness has just said he misplaced them.

(Testimony of Alfred George Cody.)

Mr. Brooks: Oh, he has misplaced them.

Mr. Purver: And we have never seen them.

Q. (By Mr. Purver): What was the substance of the rest of the conversation with Mr. O'Connor?

A. Well, it had to do with me getting my job back, or getting a job back; and he told me that he might make arrangements for me to go into the refining department through Mr.—I don't know his initials—Bill Ryan, who was a superintendent.

Q. Did he offer you a job? A. No.

Q. Proceed.

A. He did say something about he might be able to work out some kind of a way of getting me on a foreign job.

Trial Examiner Scharnikow: On a foreign job?

The Witness: On a foreign job.

Q. (By Mr. Purver): You mean out of the country?

A. Yes. I asked if that couldn't lie in abeyance, and I was going to do everything I could to get a job back here, and if I couldn't get it back, couldn't I come back and talk to him about that at a later date; and he said [322] his door was always open if I wanted to talk to him.

Q. Was there any discussion between you and Mr. O'Connor regarding seniority at this time?

A. The only thing I can remember—and I don't know whether it was in the first, second or last meeting with Mr. O'Connor—was mentioning the fact that a person who had went to work for a company when he was 21 years old and worked for them nearly

(Testimony of Alfred George Cody.)

21 years, and came to the age of 42, that that was a long time to work for a company and then get dismissed the way I was dismissed.

Q. Who said that? A. I said that.

Q. Do you remember at what meeting you said that?

A. He told me 21 years was a long time for any man to work for a company.

Q. Do you remember at what meeting that was?

A. No, I don't.

Q. In your conversation with Mr. Dreyer, was there any discussion about seniority? And I will ask you if you remember your first conversation with Mr. Dreyer, when you asked for a supervisory job back.

A. I told him that I had worked through all of the steps leading up to the top job under the contract; that I had qualified myself for some jobs by going to night school to get the additional training that I needed for the job, to be [323] prepared for the job.

I also told him that in other cases there had been people set back for making mistakes, and at the time they were told that the labor gang was good as they would ever get; that after some time back in a lower classification or in a roust-about classification, that we eventually got those people out of those jobs, back up into the regular line of progression of any of the other employees. I also said that it seemed to me like if I had made a mistake as a foreman, and I admitted as a foreman I did make a mistake,

(Testimony of Alfred George Cody.)

that that was the supreme penalty, to my knowledge that they had never done that to anyone, and named some specific cases to him where people had been set back for various things they had done on the job, and then were again put in line of progression by a committee or by his own actions; and I thought it was quite a severe penalty to discharge a person clear out of the company for refusing to do work such as he had assigned me during the strike period. [324]

He told me that they didn't have any complaint against my work as an employee. In one of those conversations, I think this is important, at least to me——

Q. I am still talking about the first conversation you had with Mr. Dreyer.

A. That was on the second conversation.

Q. You mean the conversation of November 16th?

A. Yes.

Mr. Brooks: Mr. Examiner, may we have the question to the last answer, and I will explain? I was under the impression the witness was testifying concerning his conversation with Mr. O'Connor and I am now led to believe that the last several sentences have related to a conversation he had with Mr. Dreyer.

Mr. Purver: That is right.

Mr. Brooks: I would like to know where we are.

Trial Examiner Scharnikow: Let the witness tell us.

Q. (By Mr. Purver): All of this conversation has related to whom and when did it occur?

(Testimony of Alfred George Cody.)

A. The things I was talking about last was the conversation with Mr. Dreyer in his office; I believe the second meeting.

Q. Now, when you asked for a job did you condition it upon getting seniority back?

A. No, sir.

Q. Did you specify what job you were asking for? [325]

A. No, sir.

Mr. Purver: No further questions of this witness.

* * * * *

Cross Examination

Q. (By Mr. Brooks): Mr. Cody, I want to ask you one or two questions about this letter, which is General Counsel's Exhibit 25. This letter was written by you, as I understand, [326] when your notes were available which you referred to?

A. Yes.

Q. And I take it that in writing this letter you set forth the various efforts that you had made to obtain reemployment with The Texas Company?

A. Yes.

Q. Is it your testimony that this letter correctly reflects the efforts which you made to obtain reemployment with the company, up to the date that it was written?

A. Yes.

Q. You testified, on direct examination, that your leave of absence for union business was granted in accordance with and pursuant to Article XI of the Agreement, which is General Counsel's Exhibit 23; is that correct?

A. Yes.

Q. Was that your testimony?

A. Yes.

Q. This Agreement is the one which was ex-

(Testimony of Alfred George Cody.)

ecuted on the 9th day of May, 1947. In view of that fact, of course, you do not testify, do you, that the 1941 leave of absence was taken pursuant to this contract? A. No.

Q. That leave of absence in 1941, as a matter of fact, extended in total over about a year and a half, did it not?

A. I believe that is right. [327]

Q. It was a series of leaves, wasn't it? It was continuous, but there were several leaves, one leave followed another? A. Yes.

Q. Now, I want to direct your attention to your testimony on direct examination, regarding the withdrawal card in the union. That conversation occurred, as I recall, at the time just before or about the time you were made a foreman; isn't that right?

A. Yes.

Q. Do you remember that conversation rather clearly at this time? A. I believe so.

Q. When did you first learn, and how did you first learn, that you were to be promoted into a supervisory position?

A. I am not too sure as to the date, but it was around the 9th, or in that part of the month, of January of that year.

Q. You had a conversation with Mr. Dreyer, did you not, at which time he told you that he was planning to promote you to the position of assistant foreman, somewhere in the latter part of January, is that right?

A. In the first part of January.

(Testimony of Alfred George Cody.)

Q. First part of January?

A. As I recollect.

Q. You did have such a conversation with Mr. Dreyer? A. Yes. [328]

Q. Where did that take place?

A. Mr. Dreyer's office.

Q. Was anyone else present?

A. No, I don't believe there was. I am sure there wasn't.

Q. You remember that conversation?

A. Partially.

Q. Tell me what occurred or what was said in that conversation. [329]

* * * * *

Q. (By Mr. Brooks): Now, in order that we can clear the record, I will restate the question for your benefit, Mr. Witness. I want you to tell me what was said in the conversation you had with Mr. Dreyer in January of 1948, at which time he told you for the first time that he was going to make you a supervisor.

A. He told me that he was going to make a job of supervisor for me; it was a new job and didn't even have a name for it at that time. He said that due to my experience in the gauging department and the laboratory and in the operations of the company, he thought I would be valuable to them as a foreman to make some checks on Paloma crude runs that was shipping oil which is a high gravity oil from Paloma down to the L. A. Works, and that I

(Testimony of Alfred George Cody.)

would have the supervision along with Mr. Letson, handling the people in the Pipeline Department.

This might not be the exact words, but it is the gist of the conversation. Handling the people in the operational end of the Pipeline Department in the L. A. Basin area. I asked him if it looked like I was going to have to leave Long Beach, I had my home there, and he said no, that he didn't think so. [330]

* * * * *

Q. Now, what was said in that conversation?

A. He said I probably knew as much about the law as he did, and asked me—told me that I should get a withdrawal card—he didn't say "withdrawal card," but he said I should sever my relations with the union.

I told him that I would go and ask for a withdrawal card.

Q. Mr. Cody, as a matter of fact, you mentioned the withdrawal card first, did you?

A. As such, yes.

Q. Yes. Now, I don't know whether I interrupted you or not. Were you going to tell me more about that conversation? And I am limiting it now to those matters relating to your getting out of the union or taking a withdrawal card.

A. Yes, he went into a lengthy discussion, stating to me that union activities didn't have anything to do with what he thought about a man's ability for taking care of a job; no matter what disagreements we had had in negotiations and [334] in grievance work, that he wanted me to know that with me or

(Testimony of Alfred George Cody.)

anyone else it didn't affect his judgment in picking people as supervisors.

Q. Now, you took a leave of absence, as you have testified, of some year and a half, in 1941 and 1942, for union business. At that time you were a pumper No. 1, I believe, is that right?

A. That is right.

Q. Then subsequent to that time you were promoted to a tester No. 1, were you not?

A. That is right.

Q. Now, after you were promoted to Tester No. 1, you were on leave of absence for union business again, were you not?

A. I believe so. [335]

* * * * *

Q. (By Mr. Brooks): Mr. Cody, you took a leave of absence in 1941 for union business, according to your testimony?

A. I did.

Q. After you returned from that leave of absence in 1941 you were promoted, were you not, from the job of Helper No. 1 to Tester No. 1?

A. Yes.

Q. You were granted a leave of absence for union business at some time after you had been promoted to the Tester No. 1 job, were you not?

A. Yes.

Q. You were, while a tester No. 1, still active in the union, were you not?

A. Yes.

Q. You were later promoted from the job of Tester No. 1 to field gauger, were you not?

A. Yes.

(Testimony of Alfred George Cody.)

Q. You continued your activity in the union after you were promoted to field gauger?

A. Yes.

Q. Were you not? A. Yes.

Q. And your activity in the union continued up until the time [340] you were promoted to assistant foreman. Isn't that right? A. Yes.

* * * * *

Mr. Brooks: I will withdraw the question. When did you start on your vacation in 1948?

The Witness: I believe that was August the 23rd.

Q. (By Mr. Brooks): And when was your vacation to expire?

A. I returned to work on September 13th.

Q. September 13th, 1948? A. Yes. [341]

* * * * *

Q. Tell me about this telephone conversation you had with Mr. Jones on September 8th or 9th—I mean the day you have identified.

A. You mean as to my testimony?

Q. Well, I want you to tell me what your recollection is as to what was said in that telephone conversation.

A. Well, I called Mr. Jones and told him that I was back and ready to go to work Monday. He told me that they were having some trouble and I asked him what the trouble was and he said it was a strike.

Q. Is that the first time you knew there was a strike in progress? A. Yes.

Q. You knew there was a strike in progress in Los Angeles on that day?

(Testimony of Alfred George Cody.)

A. Yes, in Los Angeles.

Q. You did not know until then it was against the Texas Company? A. No.

Q. What else did you say?

A. I jokingly said to him, "It looks like I got some more vacation coming" or something like that, to that effect, and he said, "No," they had a pass coming to do patrol work, and to be exact I believe it was patrolling and plant safety work.

Q. You were scheduled to go back to work on what day in September?

A. September the 13th.

Q. And you called Mr. Jones on either the 8th or 9th?

A. The 8th or 9th, or 9th or 10th. I am not too sure as to the date. It was either Thursday or Friday or Saturday, I don't know. It was one of those days.

Q. Why did you call Mr. Jones?

A. To let him know I was back.

Q. You were not due back to work until the 13th, were you?

A. I have always called on my return and told them that I [344] was back. It wasn't anything unusual.

Q. Now, your recollection is that Mr. Jones said that he had a pass for you and they wanted you to do patrol work?

A. Patrol and plant safety work. I don't know that that is the exact words.

Q. Well, are you positive of any one of those words, "patrol" or "safety" or "maintenance"?

(Testimony of Alfred George Cody.)

Are you positive of any one of those three words being used in the telephone conversation?

A. The word "safety" was used.

Q. The word "safety" was used? A. Yes.

Q. That is the only one you are positive of?

A. It is according to how you are going to say it.

Q. I mean those three words. I am asking you for your present recollection.

A. Yes, all three words were used.

Q. All right, and they were all three used by Mr. Jones? A. Yes. [345]

* * * * *

Q. What kind of work did you do beginning on September 13th when you first reported during the strike?

A. Patrolling the lines between the various stations, checking the gates, the locks on the gates of the fences around the various pump stations, and reporting, I believe it was every two hours, to the dispatcher.

Q. You started doing that work on the first night you worked during the strike?

A. Yes, but what I am not too clear about is maybe you are [348] thinking that midnight is Tuesday. I don't know how you are figuring that. Midnight wasn't Monday morning, it was a quarter to 1:00 Tuesday.

Q. But you started in doing the work that you have described in your direct examination and which you have just described. Is that right, and who had told you the kind of work you were to be doing that

(Testimony of Alfred George Cody.)

night? I am trying to find out how you knew what to do, Mr. Cody, beginning that evening.

A. I would say that Mr. Jones gave me part of the instructions and that I obtained the rest of them there that night.

Q. From this man whose name you don't remember?
A. Yes.

Trial Examiner Scharnikow: Was this man whose name you don't remember now the man you relieved?

The Witness: What was your question?

Trial Examiner Scharnikow: Was this man whose name you don't remember the man whom you relieved?

The Witness: I remember him but I don't remember his name.

Q. (By Mr. Brooks): He is the man whom you relieved?
A. Yes.

Trial Examiner Scharnikow: And he is the man from whom you received in part your instructions as to what you were to do?

The Witness: Well, he just went over the book that I [349] was to keep a record of things that I saw.

Q. (By Mr. Brooks): Who checks for leaks during normal operations of the Pipe Line Division?

A. The Line Rider and Gagers.

Q. Who checks the file boxes during normal operations in the Pipe Line Division?

A. I would say both the Line Rider and Gagers.

Q. You have stated that you checked the gates. Are you referring to the gates or were you referring

(Testimony of Alfred George Cody.)

to what they call the valves? A. The gates.

Q. Was that to determine whether the gates were still locked? A. Yes.

Trial Examiner: And that was normally done by Line Riders and Gagers?

The Witness: No—the fence walking, you mean?

Trial Examiner Scharnikow: Yes.

The Witness: That was normally done by pumpers on pump stations and the head pumpers at stations—well, the headquarters, I believe.

Q. (By Mr. Brooks): Can you tell whether there is oil going through the pipe lines?

A. At various places, yes.

Q. At various places, and how do you determine that? [350] A. By a girgling sound.

Q. Are those near the tanks or near the pump stations? A. Near the pump stations.

Q. And you testified that to your knowledge as far as you know there were only two occasions when oil was going through the pipe lines while you were on duty? A. Yes. [351]

Q. Now, you testified that you reported that, is that right? A. Yes.

Q. Well, tell me about your reporting the first incident, what you said, and to whom you said it, and what kind of a report you made.

A. I made my report to a dispatcher—I don't know who was on duty—and told him there was oil coming in at the Los Alamitos Farm, and he said that he didn't have any record of any oil coming in.

Q. Was that a written report or an oral report?

A. Oral report over the telephone.

(Testimony of Alfred George Cody.)

Q. You considered that as a part of your duties at that time, I take it? A. Yes, sir.

Q. Would there be leaks in the pipeline if no oil was being pumped through? A. Yes.

Q. They would be less likely, I presume, would they not? A. Yes.

Q. Because there is no pressure. You continued from the 13th, the night of the 13th,—which would be 12:01 of the morning of the 14th—to work each evening doing the same kind of work, until when?

A. They gave me two days off that week, but I don't [352] remember what the days was. I think I can find the schedule that was handed to me.

Q. You don't remember how many days you worked, then, before you—how many continuous days you worked, beginning on the early morning of the 14th? A. I am not sure, no.

Q. Do you remember the day your accident occurred? A. Yes.

Q. Had you worked continuously on a 40-hour a week basis from the time you commenced during the strike until the time of your accident?

A. Yes.

Q. Having two days off, I guess, each week?—Well, strike that.

When did the accident occur?

A. Thursday, September the 23rd.

Q. That is the day of the accident?

A. Yes.

Q. Then, except for two days off, you worked

(Testimony of Alfred George Cody.)

each day between the morning of the 14th and the 23rd? A. I believe that is right.

Q. Did you have any conversations during that time with Mr. Jones, regarding the type of work that you were doing and regarding your duties?

A. Yes. [353]

Q. Do you remember when that took place?

A. I believe I would be correct that every morning while I was on the daylight shift.

Q. Every morning you talked to Mr. Jones?

A. While I was on the daylight shift.

Q. On any of those mornings, did he give you any instructions regarding the work that you were to do? A. I don't remember any.

Trial Examiner Scharnikow: What is the daylight shift?

The Witness: 8:00 to 4:00.

Q. (By Mr. Brooks): During the time between the morning of the 14th and the date of your accident, did you have any conversations with Mr. Dreyer regarding the duties that you were to perform or were performing? A. Yes.

Q. Do you remember when that took place?

A. In the early part of the week of—I don't remember the day—ending September the 25th.

Q. And where did that conversation take place?

A. In Mr. Jones' office.

Q. Who was present?

A. I believe Mr. Jones and Mr. Dreyer.

Q. Will you tell me what was said in the conversation, please?

(Testimony of Alfred George Cody.)

A. Yes. As I was going through the refinery picket line and some of the pickets hollered and told me to tell Mr. Dreyer [354] that he had better cut out trying to haul guys through that picket line.

He asked me who they were; and I told him there were about 60 to 65 people on the picket lines that morning, and that I didn't know who said what. One guy hollered from the front, and I turned, and another guy hollered from the back; and he told me something about that that was one of the things that was wrong with me as a supervisor. That I should remember who said those things.

Q. Anything else?

A. Not that I remember.

Q. Did you show your pass that morning when you came through? A. Yes, sir.

Q. Then this was not said to you at the time you stopped to show your pass, but——

A. As I was leaving to drive away.

Q. ——as you were leaving. Was anything else said at that time, I mean about your duties?

A. I don't recollect any other thing being said.

Q. Now, yesterday you testified, Mr. Cody, that during the week that you were scheduled to work from 8:00 to 4:00, which is the daylight shift, there were some run tickets, only, to be delivered to some parts; is that correct? A. Delivered where?

Q. Some parts. You didn't say yesterday where they were to [355] be delivered.

A. I didn't know.

(Testimony of Alfred George Cody.)

Q. But there were some run tickets which were to be delivered? A. Yes.

Q. What are run tickets?

A. It is a document that shows, by a witness, how much oil was shipped from a tank, by high and low gauge, and temperature and cut.

Q. Who makes out the run tickets?

A. Normally, gaugers.

Q. And who made out these run tickets?

A. I don't know.

Q. Run tickets are normally to be delivered to the office, are they? A. Yes.

Q. And these, according to your testimony yesterday, were to be delivered, and you testified, "I was not asked directly to take them."

Did anybody ask you indirectly to take the run tickets some place? A. Yes.

Q. Who?

A. Mr. J. J. Evans, chief dispatcher.

Q. And was that on the day—during the week you were working daylight shift? [356]

A. Yes, sir.

Q. Do you remember what day it was?

A. No.

Q. What did Mr. Evans say?

A. He said that these run tickets had to be delivered.

Q. What did you say?

A. I didn't say anything.

Q. Where were the run tickets?

(Testimony of Alfred George Cody.)

A. In his hand.

Q. What did he do with them?

A. Placed them on my desk.

Q. And what did you do with the tickets?

A. Nothing.

Q. You left them lying on the desk?

A. Yes, sir.

Q. When you left at the end of your shift, were they still lying on your desk?

A. Yes, sir. Not at the end of my shift; left at the end of my conversation with Mr. Jones.

Q. At the end of your conversation with Mr. Evans, you mean? A. Jones.

Q. Jones. Did you have a conversation with Mr. Jones about those run tickets? A. No.

Q. Well, I am confused. Mr. Evans had some run tickets [357] in his hand, and laid them down on your desk; is that right?

A. After he said they had to be delivered.

Q. And you said nothing, but left them lying on your desk? A. Yes.

Q. Then did you leave your desk?

A. Soon after that I went out on a patrolling job.

Q. And left them lying on the desk?

A. Yes, sir.

Q. Did you later, during that shift, come back to your desk? A. No, sir.

Q. Did you come back to your desk the next day?

A. Yes.

Q. Were the run tickets still there?

A. No, sir.

(Testimony of Alfred George Cody.)

Q. You also testified that on Tuesday of that week, which is the week you worked daylight shift, there were some strappings, that is, measurements on tanks, that were to be delivered; is that right?

A. That is right.

Q. Are strappings written reports of measurements of the tanks? Is a strapping a written report? Just describe what a strapping is.

Trial Examiner Scharnikow: Will you tell me, how do you spell that, incidentally? [358]

Mr. Brooks: That is s-t-r-a-p-p-i-n-g-s.

The Witness: Yes. It is a sheet of paper that has on it markings in feet and inches of the tank, pipe number, and is used to determine how much oil, quickly, by guaging a tank and reading the gauge, and looking on the strapping as to how much that guage represents in oil in that tank.

Trial Examiner Scharnikow: In terms of gallons or barrels?

The Witness: Usually barrels; sometimes in gallons.

Q. (By Mr. Brooks): That strapping report is made out by whom?

A. I believe the engineers' department.

Q. Do you know who made this particular strapping report out that we are speaking of?

A. No.

Q. Who normally delivers the strapping report?

A. I don't know.

Q. Your testimony was that there was such strappings to be delivered. Where did you first see these

(Testimony of Alfred George Cody.)

strappings? A. In Mr. Evans' hands.

Q. Was this the same day that the run ticket incident occurred? A. No.

Q. Where was Mr. Evans when you saw them in his hands?

A. In the hallway outside of his office. [359]

Q. Did Mr. Evans say anything to you about them?

A. Yes, he did. He said that these strappings had to be delivered. That is how I knew they were strappings, because they were in an envelope.

Q. Did you say anything?

A. I told him he could depend that I wasn't going to take them for him.

Mr. Hackler: Will you read the answer back, please?

(The answer was read.)

Q. (By Mr. Brooks): How long did you continue your work, to the best of your recollection, after that incident, not that day but until the 28th?

A. I worked Monday, Tuesday, Wednesday, Thursday and Friday—Thursday, 8:00 to 4:00; I worked Friday from 4:00 to 12:00, and I didn't work any more.

Q. Were there any other incidents——

Trial Examiner Scharnikow: Is that an answer to your question?

Mr. Brooks: I think so. Read it.

Trial Examiner Scharnikow: I thought the question was how long that day.

(Testimony of Alfred George Cody.)

Mr. Brooks: Not that day.

Trial Examiner Scharnikow: Oh, I misunderstood you; I misheard.

Q. (By Mr. Brooks): Were there any other incidents prior to [360] September 28th when you chose not to perform some task that was either requested of you or suggested to you?

A. Not that I remember.

Q. The next occasion, and the only other occasion, according to your present recollection, other than these two regarding the run tickets and the strappings, was on September 28th? A. Yes.

Q. Now, directing your attention to September 28th, what time did you report to Mr. Jones' office that day?

A. I believe it was about 11:30 in the morning.

Q. That was on Tuesday, September 28th?

A. Yes, sir.

Q. You had received a telephone call on the previous day, Monday, the 27th?

A. As I recollect it, yes.

Q. And that was from Mr. Jones? A. Yes.

Q. Were you at home when he first called, as far as you know? A. So far as I know.

Q. Do you recall what time of the day that was?

A. No.

Q. Will you tell me, as best you can, what was said in the telephone conversation of the 27th between you and Mr. Jones? [361]

A. On the telephone, he just asked me to come

(Testimony of Alfred George Cody.)

into his office Tuesday at noon, "the next day at noon," I believe his words were.

Q. And you said, "O.K." or something to that effect?

A. I assured him that I would be there.

Q. Do you remember any other conversation that occurred at that time? A. No.

Q. When you went to the office on the 28th, you went directly to Mr. Jones' office?

A. Yes, sir.

Q. Was there anyone in the office with Mr. Jones when you entered? A. Yes.

Q. Who? A. Ray Rogers.

Q. Who is Ray Rogers?

A. He is foreman of the maintenance crews, pipe line division.

Q. Did any conversation occur between you and Mr. Jones while Mr. Rogers was present?

A. No.

Trial Examiner Scharnikow: The answer is "No"?

The Witness: "No."

Q. (By Mr. Brooks): Then tell me, as best you can remember, [362] what Mr. Jones said to you and what you said to Mr. Jones on that occasion.

A. His reason for calling me in was that they were going to change our schedules, that the company was going to start operations, and that managerial people would go on 12-hour days, six days a week, and that we would be paid time and a half for the 32 hours.

(Testimony of Alfred George Cody.)

Q. That would mean that the first 40 hours would be at straight time, and then the last 32 hours of the week at time and a half, is that correct?

A. I think so.

Q. Now, when Mr. Jones told you that they had decided that the managerial employees were going on this six-day, 12-hour a day shift, what did you say?

A. I believe I asked him if they had notified the union.

Q. Your present recollection is that you asked him if they, meaning Mr. Jones or someone with the company, had notified the union? A. Yes.

Q. What did Mr. Jones say to that?

A. "No."

Q. And then what did you say?

A. I don't believe I said anything. I think he said the rest of it.

Q. And what was the next thing that Mr. Jones said? [363]

A. That we were going to—this might not be in sequence the way he said it.

Q. Well, tell it as best you can.

A. That we weren't going to ride patrolling singly any longer, that we were going to ride in pairs, and that the person who was going to ride with me was a man by the name of Hugo. I couldn't remember it yesterday.

Q. It is Huso, isn't it, H-u-s-o?

A. Yes, Huso. I asked him what he wanted me to do, then that is when he told me that—Mr. Jones'

(Testimony of Alfred George Cody.)

conversation was just a little bit different than Mr. Dreyer's.

Q. Now, at this time we are with the Jones conversation.

A. Mr. Jones said that he wanted me to go over to Yorba Linda and engage in sampling the tanks for a first-of-the-month report.

Q. He also said he wanted you to take the temperature, did he not?

A. Well, sampling means all of that.

Q. That is right. All right, Mr. Jones said, "I want you to go over to the Yorba Linda station and sample and gauge the tanks for the first-of-the-month report"? A. Yes.

Q. Did he say anything else in connection with taking the sampling and gauging of those tanks?

A. Yes, I believe he did say that I was to take samples [364] down to the Signal Hill lab and run them.

Q. He told you that these reports needed to be in by October 1st, did he not?

A. He said the first of the month reports. [365]

Q. He told you, did he not, that you could do that at any time between the time he was talking with you and the first of the month? A. Yes.

Q. What did you say when Mr. Jones wanted you to take this sampling and gaging of the tanks and you could do it any time between then and the first of the month?

A. Well, generally I related my history to him in relation to the Oil Workers International Union

(Testimony of Alfred George Cody.)

and my membership, participating in the harbor councils that I was assigned to.

Q. Had anyone connected with the union said anything to you prior to that time and after you had started to work on the 14th about the kind of work that would be permissible in the eyes of the union for you to do? A. No.

Q. You told Mr. Jones that you felt that you should not do the gaging and sampling work because it was work that was normally performed by non-supervisory people. Is that correct?

A. Yes.

Q. And then you related to him your long history with the union which constituted the basis for your not wanting to do that. Is that right?

A. Yes.

Q. Was it about that time that Mr. Dreyer walked by? A. Yes. [366]

Q. And I believe that you testified that Mr. Jones called to Mr. Dreyer to come in to the office. Is that right? A. That's right. [367]

* * * * *

Q. Will you tell us what was said in the conversation between you, Mr. Jones and Mr. Dreyer after he came into the office on this occasion on September 28th?

A. As I remember it, Mr. Jones said to Mr. Dreyer that he had talked over the assignment with me and that I didn't feel like I could do it. Mr. Dreyer then went through a long talk and I talked to Mr. Dreyer again about my position in the thing. It

(Testimony of Alfred George Cody.)

finally came out that it was he who gave the order, and he said that what he wanted me to do was to go over to Yorba Linda and gauge and sample the tanks and get the station ready to run. I refused to do it and [370] he terminated me.

Q. Now, are you positive that Mr. Dreyer said that he wanted you to get the station ready to run?

A. That is what he said.

Q. What did you say when he said he wanted you to get the station ready to run?

A. I didn't even discuss it with him.

Q. Did you make any reply?

A. Only that I wouldn't do it.

Q. You said, "I won't do it"?

A. Well, I just refused to do it. I don't know how I said it.

Q. Had Mr. Jones told you that he wanted you to get the station to run? A. No, sir.

Q. Did you mention to Mr. Dreyer that you suggested that the other man go along and do the work and you do the driving?

A. Did I say that?

Q. Yes. A. Yes, sir.

Q. Did you say that to Mr. Dreyer?

A. Both of them were sitting there.

Q. Well, did you say it on two occasions, once while Mr. Dreyer was not there and then again after Mr. Dreyer was there? [371]

A. I don't remember whether I did or not.

Q. But you know you said that one time?

A. Yes, sir.

(Testimony of Alfred George Cody.)

Q. What was Mr. Dreyer's or Mr. Jones' reply to your suggestion that the other man do the work and you drive him around?

A. Said that that wasn't fair to the other people on management's payroll, to expect them to do things and me not to. They also stated that they never asked me to perform any work before this particular time, forced me, I should say. They had never forced the issue about me performing any work until this particular time.

Q. Who said that?

A. I believe Mr. Dreyer.

Trial Examiner Scharnikow: May I interrupt for a question or two?

You say you suggested that you drive another man over there to get the station ready. Is that right, Mr. Cody?

The Witness: They had assigned a man to go with me by the name of Huso, I believe, and I told them that I would drive him over there and let him do the work, and that is when they told me it wasn't fair to ask other people in management to do the work and not ask me to do it.

Trial Examiner Scharnikow: What was Huso's job?

The Witness: I am not certain, but I think he was [372] called a junior engineer.

Trial Examiner Scharnikow: Can we have an agreement as to whether or not a junior engineer is a supervisory employee?

Mr. Purver: If the company says so.

(Testimony of Alfred George Cody.)

Mr. Brooks: We will stipulate he is a supervisory employee.

Mr. Purver: I so stipulate.

Trial Examiner Scharnikow: Off the record a second.

(Discussion off the record.)

Mr. Brooks: Mr. Examiner, I would like to clarify the stipulation regarding the junior engineer, Mr. Huso. He is not a supervisory employee in the true sense of the word, because he does not have employees working under his supervision. He is, however, excluded from the bargaining unit as a managerial employee and as a technical employee. He is, in our position, a representative of management as distinguished from the rank and file.

Trial Examiner Scharnikow: You agree with the stipulation?

Mr. Purver: That is satisfactory, yes.

Trial Examiner Scharnikow: Thank you.

Q. (By Mr. Brooks): Mr. Cody, did Mr. Dreyer also state that you could have until the 28th of September, until the first of the month to do this job that he had ordered you to do? [373]

A. No, Mr. Dreyer didn't.

Q. Did Mr. Jones state that? A. Yes.

Q. And you are positive that Mr. Dreyer did not?

A. He didn't say anything about it.

Q. I believe you testified that this Yorba Linda station is operated by steam.

A. That is correct. [374]

(Testimony of Alfred George Cody.)

Q. Have you ever in your 21 years' experience with the company started up a steam pumping station? A. Yes.

Q. And how many assistants did you have with you? A. None.

Q. And did anyone then take over the operation of the station after it was started?

A. I don't understand your question.

Q. Could you start a steam pump station to operating and then leave it unattended?

A. After you got it on the line?

Q. Yes. A. Certainly.

Q. What would be entailed in starting that Yorba Linda station to operate?

A. Firing the boilers.

Q. How are the boilers fired? A. By gas.

Q. What would you have to do to fire the boilers?

A. You mean from beginning to end, now?

Q. Yes.

A. Blow out or air out the fire box, check all lines to see that there wasn't any leaks any place. Probably in that case where they have lines blinded off, you would have to change the blind, on the boilers you were going to light up, see that [375] the correct amount of water was in the boiler and then light the boiler and bring it up very slowly.

Q. How long would that take?

A. It should take at least two hours.

Q. What would be the next thing you would do to get it on the line?

A. To get the boiler on the line?

(Testimony of Alfred George Cody.)

Q. To get the station to operating and get the oil going through the lines.

A. There are a lot of things at that Yorba Linda pump station in the operations that a pumper has more to do than just getting the pump started. If you just want a pump started, you would get steam up on the boiler, open the boiler on the steam line, and open the steam line onto the oil pump.

First, open the oil lines onto the pump and then open the steam line and then start pumping.

Q. And then after that was done, it is your testimony that it would be good practice to leave the station unattended without the presence of a pumper?

Mr. Purver: I object. He hasn't testified that it was good practice to do so.

Mr. Brooks: Well, I will rephrase the question.

Q. (By Mr. Brooks): Would you testify that it is good practice to start the pump after it had been idle—start [376] the station after it had been idle, and then leave it unattended?

A. I am going to have to clear up with you what you mean by "unattended." If you mean going across the street and gauging and sampling of the tanks, it is done every day. It has been done every day since they started up over there.

Q. How long then could you leave it unattended without watching it immediately after it started operating after several weeks' idleness?

A. Any good pumper would check it every few minutes.

(Testimony of Alfred George Cody.)

Q. Did you say Mr. Dreyer said for you to start the station operating?

A. No, I didn't say that.

Q. Let me get it exactly right. What did he say to you?

A. I said Mr. Dreyer's order to me was to go out and gauge and sample the tanks at Yorba Linda and get that station ready to run period. That was all that was said about it.

Q. Now, and your answer was, in effect, "No, I will not do it"? A. In effect, yes.

Q. Did you tell Mr. Dreyer at that time that you were willing to continue to ride the lines to check for leaks?

A. Yes, I told Mr. Dreyer at that time that I was willing to ride the lines even 18 hours a day if they needed that kind of work. [377]

Q. And did you tell him that you were willing to continue to check the gates? A. What gates?

Q. The gates that you have testified you did check.

A. The gates on the fences?

Q. Well, you have testified you checked the gates, Mr. Cody. Isn't that right?

A. I testified that I saw that the locks on the gates of the fences were locked.

Q. Did you tell Mr. Dreyer that you were willing to continue to check the gates to see that the locks were locked?

A. No. That wasn't discussed.

Q. Did you tell Mr. Dreyer that you were willing to continue to check the valve boxes?

(Testimony of Alfred George Cody.)

A. That wasn't discussed.

Q. Did you tell Mr. Dreyer when he told you what he wanted you to do that he would have to give an order to that effect? A. Yes, sir.

Q. And then what did Mr. Dreyer say?

A. That is when he gave his order.

Q. And then you said, "I refuse to do it," or words to that effect? A. That is right.

Q. As I understood your testimony Friday and Thursday, the basis for your refusal to do that work was that it is [378] normally performed by rank and file employees. Is that right? A. Yes.

Q. And as I understood your testimony, you declined to deliver the strappings because that it is normally performed by nonsupervisory employees. Is that right?

A. I didn't refuse to take them.

Q. No; you declined. You just didn't do it; is that right? A. That is right.

Q. It was on your desk, or, I believe, the strapings were offered to you by Mr. Evans. Is that right? Not directly, no.

Q. And you told him, at least, that he could depend on you not delivering them, didn't you?

A. That is right.

Q. And the reason for that was because that is normally done by nonsupervisory employees?

A. Not necessarily.

Q. Do you know who normally does that work?

A. It could be a lot of people.

Q. Well, what was the basis for your not doing

(Testimony of Alfred George Cody.)

the work at that time, namely, delivering the strappings?

A. Generally because the strappings that are sent out to various companies, at least, are to show on the run tickets as to how much oil was shipped from a tank. I wanted no part in the operation. [379]

Q. Is the delivery of the run tickets which were laid on your desk normally made by nonsupervisory employees?

A. Some of them, yes.

Q. Is that the basis for your not delivering the run tickets?

A. Because it was part of an operation, yes.

Q. You were not ordered to take the strappings and deliver them, were you?

A. No, sir.

Q. You were not ordered to deliver these run tickets, were you?

A. No, sir.

Q. Do you remember a discussion with Mr. Dreyer during this conversation of the 28th with respect to the presence or absence of pickets at the Yorba Linda station?

A. Yes, I believe I do.

Q. What was that conversation?

A. I think that he said——

Trial Examiner Scharnikow: When?

Mr. Brooks: This was in the September 28th conversation. Is that right?

The Witness: I am not too sure as to the time.

Q. (By Mr. Brooks): Let me rephrase the question, Mr. Cody. Was there a conversation on the 28th at the time Mr. Jones, Mr. Dreyer and you were conversing, wherein the presence or absence of pickets

(Testimony of Alfred George Cody.)

at the Yorba Linda station was mentioned? [380]

A. Yes.

Q. Relate that conversation to us, please.

A. As I remember, he said that he had noticed that there weren't always pickets at the Yorba Linda pump station, and that I could pick my time to go into the station so as not to get those people irritable.

Q. Did you make a reply to that?

A. I don't believe I did.

Q. Was anything else said about pickets or picking your time, that you now recall? A. No.

Q. Mr. Cody, still referring to the conversation of the 28th you testified that you described to Mr. Jones the history of your activities on behalf of the union while an employee of the company, and that such was the reason for your refusing to do this work, I believe. Is that right? A. Yes.

Q. Did you repeat that conversation to Mr. Dreyer? A. Yes.

Q. Did you tell him that this history of your activities was the reason that you did not wish to do the work or the reason that you refused to do the work?

A. Yes. I told him that I had an actual fear of what would happen to my family and my home because of my activities in the union, especially relating to what you are asking me now [381] about the committee that I was a member of in the Los Angeles Basin area.

Q. Now, up until September 28th, according to

(Testimony of Alfred George Cody.)

your testimony, you had driven through the picket line.

A. With a pass.

Q. On September 28th did you have a pass?

A. Yes, sir.

Q. Had anybody in the union said anything to you about revoking or recalling the pass?

A. No, sir.

Q. I want to direct your attention now to the first conversation you had with Mr. O'Connor in November wherein you talked to him about getting your job back. You testified that this conversation was on November 4. Is that right?

A. As I remember it, yes.

Q. At least it was on or about November 4?

A. That is right.

Q. General Counsel's Exhibit No. 13, which is the strike settlement, is dated November 4, 1948. Do you know whether you conversed with Mr. O'Connor on that day or a day or so after, or does that help you place it?

A. My memory is that it was the same day.

Q. Same day. Mr. O'Conner told you at that time, did he not, that in view of the circumstances of your discharge that it would be necessary for you to make your peace, as it were, [382] with Mr. Dreyer before you could be rehired or reinstated?

A. Yes.

Q. Next, I wish to direct your attention to the November 8th conversation which was the first one you had with Mr. Dreyer after your dismissal. At that time was there still a picket line at the Pipeline Division operations?

A. No.

(Testimony of Alfred George Cody.)

Q. In that conversation you requested reinstatement to your job as a supervisor, did you not?

A. Yes.

Q. On November the 15th when you next saw Mr. O'Connor did not Mr. O'Connor repeat that if you were reemployed, Mr. Dreyer would have to do it?

A. Yes.

Q. Did Mr. O'Connor state at that time that such was true because Mr. Dreyer had discharged you for refusing to obey an order?

A. No, I don't believe he said that.

Q. Did he say anything substantially the same as that, and, if so, tell us what he did say?

A. All I can remember is that he told me that I had to make my peace with Mr. Dreyer.

Q. You next talked to Mr. Dreyer on November 16, as I remember it. Did you at that time ask Mr. Dreyer for reinstatement to your position as a supervisor? [383]

A. No.

Q. Referring back to the first conversation with Mr. O'Connor, did you not tell Mr. O'Connor that you were very anxious and eager to return to work for The Texas Company in order to protect your long service with the company?

A. With Mr. O'Connor?

Q. Yes. A. Yes.

Q. The first conversation? A. Yes.

Q. In the first conversation with Mr. Dreyer on November 8 you told him the same thing, did you not?

A. I don't remember whether I did or not.

(Testimony of Alfred George Cody.)

Q. Would you deny that you told him that you wished to return to the company's service in order to protect the 21 years you had with the company?

A. On November the 8th?

Q. Yes.

A. I might have said that.

Q. On November 16th in the conversation with Mr. Dreyer, did you say that you wished to return to the employ of The Texas Company because of your long service with the company and in order to protect that service?

A. I didn't qualify it at all. I just offered to return to work to any job. [384]

Q. Mr. Jones was present at that conversation, wasn't he? A. Yes.

Q. Tell me as best you can what you said to Mr. Dreyer with respect to your return to work in the conversation of November 16th.

A. On that particular day I didn't do much talking. He done most of the talking.

Q. You remember that conversation at the present moment, do you?

A. I remember of having it, yes.

Q. Can you tell me now how the conversation started? A. Yes, I believe I can.

Q. Will you do so?

A. I told him that I was there to get a job back in the pipe line division.

Q. What did Mr. Dreyer say?

A. He told me that he thought my act was a *premeditated* act, that if it had been something that I had

(Testimony of Alfred George Cody.)

done on the impulse of a moment he might be able to excuse it, but he thought I had planned it.

Q. What did you say?

A. I don't believe I said anything.

Q. As I understand your testimony, it is that you said these words in applying to Mr. Dreyer, "I would like to have a job back in the pipe line division." [385]

A. Yes, and I qualified the words.

Q. Tell me how you qualified them.

A. I qualified them by telling him I had worked on nearly every job they had had in the pipe line department and, to my knowledge, I had never been told that I wasn't doing a job, and that I thought the company should consider the amount of experience and the training that I had had in determining whether they was to put me back on the work or not.

Q. And you said nothing, I believe you have testified, about your past experience except that you had worked on nearly every job?

A. That is right, I didn't condition my request for a job because of seniority or any other thing. I just asked for a job.

Q. No, you didn't say you offered to return if they gave you all of your service credit and only if they gave you all your service credit, did you?

A. No.

Q. But the past service was discussed?

A. By me?

Q. Yes.

(Testimony of Alfred George Cody.)

A. Only relating to the experience and training that the company had given me.

Q. You did state, did you not, Mr. Cody, that you hated [386] to lose that 21 years service that you had with the company? A. Naturally.

Q. You did state that, did you not?

A. In this meeting?

Q. Yes.

A. I don't remember I did. I did in the first one.

Q. But you are not sure about the November 16th meeting?

A. No, I don't know whether I discussed that.

Q. Referring now to the meeting you had with Mr. O'Connor in early January of 1949, did you say anything to Mr. O'Connor about the letter that you had written to him under date of December 16, 1948, and which is now in evidence as General Counsel's Exhibit 25?

A. The next meeting I had with Mr. O'Connor after I wrote the letter, he discussed it with me.

Q. Well, was the meeting early in January, 1949, the first meeting that you had with him after you had written the letter?

A. I think that I testified that is how I remember it.

Q. Do you recall now whether or not the January meeting was the first one you had with Mr. O'Connor after the letter? A. Yes.

Q. And you did mention that letter at that conversation? A. I didn't; he did. [387]

Q. Mr. O'Connor did? A. Yes.

(Testimony of Alfred George Cody.)

Q. Isn't it a fact that at that time you told Mr. O'Connor that you were very anxious to get back with the company in order to protect the 21 years' service? A. No.

Q. Isn't it true, Mr. Cody, that you said you would appreciate Mr. O'Connor helping you get a job in some other department with the company in order—I will break that down. Didn't you say you would appreciate his getting you a job in some other department of the company?

A. I think he suggested it.

Q. It is your recollection that Mr. O'Connor suggested that? A. Yes, sir.

Q. Would you deny that you suggested that?

A. Yes, I would deny that I suggested it.

Q. Did you not state that you would like to have a job in some other department of the company if you couldn't get back in the pipe line division, in order to protect your 21 years' service with the company?

A. No, I never made a statement like that.

Q. You are a participant in the company's pension plan, are you not? You were as an employee of the company? A. Yes.

Q. Have you taken any action regarding that pension plan [388] since your dismissal on September 28th? A. Have I taken any?

Q. Yes. A. No.

Q. Have you been informed that it is cancelled or revoked?

A. No. As I understand it, I have an annuity that

(Testimony of Alfred George Cody.)

was sent to me by the Travelers Insurance Company because I had 20 years' service. I have a certain amount of pension coming to me at a certain age.

Trial Examiner Scharnikow: By that, do you mean that you are receiving payments now?

The Witness: No, not until I am 65 years old.

Q. (By Mr. Brooks): Isn't it true that you told Mr. O'Connor that you would like to get back in order to protect the service and to protect that pension?

A. Not at that time. I did earlier. I gave him quite a pitch on it.

Q. But it is your testimony, I take it, that you did not say that after November 16th? A. No.

Q. You were a participant, were you not, in the company's group life insurance plan?

A. Yes.

Q. After September 28th did you take any action to convert or take any other kind of action with respect to this insurance [389] policy?

A. The policy?

Q. Yes.

A. Maybe I don't understand the difference.

Q. Well, you are a participant in the company's plan whereby you are insured, I believe. Isn't that right? A. I was.

Q. My question is, did you take any action respecting the insurance policy or the insurance plan after September 28th when you were dismissed?

A. Not that I recall.

Trial Examiner Scharnikow: You are not paying any premium on any policy that came out of that

(Testimony of Alfred George Cody.)

group life insurance, are you? A. No.

Q. (By Mr. Brooks): You testified on direct examination that you told Mr. Dreyer—I believe I am correct now. You correct me if I am wrong. You told Mr. Dreyer on November 16th that you admitted you made a mistake as a foreman. Is that a correct statement? A. Yes.

Q. And that was on November 16th?

A. Yes.

Q. And you stated at that time to Mr. Dreyer that other foremen had made mistakes and had been put back in the line of [390] progression. Is that right? A. No.

Q. You did not testify to that? A. No.

Q. Did you ever make such a statement to Mr. Dreyer? A. No.

Q. Did you ever make such a statement to Mr. O'Connor? A. No.

Q. Did you ever state to Mr. Dreyer that an employee had made a mistake for which he had been discharged and that later he had been reinstated and put back in the line of progression?

A. Not exactly that way.

Q. Did you use the words "line of progression"?

A. Yes.

Q. What conversation was that?

A. I just mentioned to him of cases that had happened where people were given disciplinary action for something they had did.

Trial Examiner Scharnikow: This is to Mr. Dreyer or to Mr. O'Connor?

(Testimony of Alfred George Cody.)

The Witness: This is to Dreyer.

Trial Examiner Scharnikow: When?

Q. (By Mr. Brooks): On November 16th?

A. I can't swear as to that. I had a number of meetings [391] with him.

Q. On your direct examination, Mr. Cody, on October 28th, Friday, you testified that your statement to Mr. Dreyer that other people had been set back for various things they had done on the job and then were again put in line of progression by a committee or by his own actions, on November 16th.

A. That might have been when it was.

Q. Mr. Cody, do you remember having a conversation with Mr. Dreyer about reinstatement on February 1, 1949? A. Not on reinstatement.

Q. Did you have a conversation with him on that day? A. Either the 1st or 2nd.

Q. Was that conversation held in the afternoon, at the office of the pipe line division?

A. I believe so.

Q. Will you tell us what transpired in that conference?

A. I just told him I was over to see him about getting a job. He asked me if I had any evidence, any further evidence, and I didn't have any more to offer than what I had already told him.

Q. How long did this conversation last?

A. I don't know.

Q. Was it as long as an hour?

A. I don't remember. I don't remember how long it was. [392]

(Testimony of Alfred George Cody.)

Q. Was Mr. Jones present at that conversation?

A. Yes, sir.

Q. Isn't it true that in that conversation of early February, either February 1st or 2nd, according to your testimony, that you stated to Mr. Dreyer that you would continue to work and do everything you could to get back with the Texas Company in order to save your 21 years of service?

A. No, I didn't say it that way at all.

Q. How did you say it?

A. I told him that I would do everything within my power to get a job back in the pipe line department at the Texas Company.

Q. Now, you emphasized the word "a".

A. A job back.

Q. And the word "back." Is that right?

A. Yes.

Trial Examiner Scharnikow: Is that right?

The Witness: Yes, get a job back. I believe that is the words I used.

Q. (By Mr. Brooks): At that time, isn't it true that you asked Mr. Dreyer if there were any possibility of your getting a job up North?

A. I believe I did.

Q. And when you asked him if it were not possible to get a job with the company up North, didn't you say something [393] to the effect that you wished to do that even to the extent of moving in order to protect your past service?

A. No, I didn't say anything about past service.

Q. Referring back to the conversation with Mr.

(Testimony of Alfred George Cody.)

O'Connor, which you testified occurred in early January of 1949, you said something was said about a foreign job, I believe was your testimony. Is that right? A. Yes.

Q. Isn't it true that in connection with the discussion that you and Mr. O'Connor had concerning the procurement of a job with the company in some other department, that Mr. O'Connor said, "I will see if I can get you a job with the foreign operations department"?

A. No, that isn't how I understood it. [394]

Q. Well, is that what he said?

A. I say again that isn't the way I understood him.

Q. How did you understand him, what did you understand him to say?

A. It was about meeting with Mr. Dreyer. We were discussing a meeting with Mr. Dreyer and he said that if I couldn't get Mr. Dreyer to accept me back, to come back up and see him, that maybe through the New York office he could arrange a job in some foreign part of the company. That is as I remember.

Trial Examiner Scharnikow: Did Mr. O'Connor tell you that if Mr. Dreyer wouldn't take you back, he would see, that is, O'Connor would see, about a foreign job for you?

The Witness: Yes, sir.

Trial Examiner Scharnikow: Is that what he said?

The Witness: Yes, sir.

(Testimony of Alfred George Cody.)

Trial Examiner Scharnikow: That he would see about a foreign job only if Dreyer would not take you back?

The Witness: That was the tenor of the conversation.

Q. (By Mr. Brooks): What was your response, Mr. Cody, to Mr. O'Connor's offer in that respect?

A. I asked him if I couldn't continue trying to get a job back in the Pipeline Division, and that if I couldn't, couldn't I come back up and discuss this with him at a later date. He said his door was open to me any time.

Q. Did you ever file a written application for a job with [395] The Texas Company after September 28, 1948?

A. No.

Q. How old are you, Mr. Cody?

A. 42.

Mr. Brooks: I have no further questions.

Redirect Examination

Q. (By Mr. Purver): Mr. Cody, you testified that you had taken a series of leaves of absence since 1941 on union business. Is that correct?

A. That is right.

Q. Now, was there a union contract in existence in 1941?

A. Yes, sir.

Q. And during the subsequent years?

A. Yes, sir.

Q. Did those contracts provide for leaves of absence on union business?

A. Yes, they did.

Q. Did you take your leaves in accordance with those provisions of the series of contracts providing for leaves on union business?

A. Yes.

(Testimony of Alfred George Cody.)

Q. You testified that the first meeting of the Workmen's Committee in February, 1948, Mr. Dreyer or Mr. Jones indicated that you could not participate in that meeting. Is that correct? [396]

A. Yes.

Q. Do you know of any occasions where company employees were told they could not participate in such Workmen's Committee meetings prior to that time?

A. Yes.

Q. Will you tell us when and who?

Trial Examiner Scharnikow: And how he knows.

Q. (By Mr. Purver): And how you know.

A. Because I was present at a meeting when Robert Fisher, who was a member of the Workmen's Committee, was serving as a relief dispatcher and attended one of the Workmen's Committee meetings in 1947 with Mr. Dreyer, and Mr. Dreyer said to him, "What are you doing in here?" He didn't have much of an answer and Mr. Dreyer said, "You are part of management," and he said, "As such you can't serve on a workmen's committee." He sat in as a visitor.

Q. Now, your vacation lasted from August 23 to September 13, as I understand?

A. Yes.

Q. What part of that vacation did you spend out of Los Angeles or out of Long Beach?

A. I left about four or five days before Labor Day and came back either Wednesday or Thursday or Friday. I am not sure when I came back home.

Trial Examiner Scharnikow: After Labor Day?

The Witness: After Labor Day.

(Testimony of Alfred George Cody.)

Q. (By Mr. Purver): When was the first occasion that you learned that a strike was actually taking place among the employees of The Texas Company Pipeline Division?

A. When I called Mr. Jones to report back.

Q. Had you received any information whatsoever that there might be a strike prior to that time?

Mr. Brooks: Mr. Examiner, I object to that as immaterial.

Trial Examiner Scharnikow: I think some point was made by you in your examination, Mr. Brooks, and in the course of it you asked the witness whether he had seen the newspapers.

Mr. Brooks: Regarding his knowledge of a strike being in progress.

Trial Examiner Scharnikow: That is right.

Mr. Brooks: And he has now testified that he didn't see a newspaper, that he did not know there was a strike in progress until he received the telephone call, or he made the telephone call.

Trial Examiner Scharnikow: I am going to permit it, Mr. Brooks. I will overrule the objection.

So you want the question read back, Mr. Cody? Do you understand it? Do you want it read back?

The Witness: Yes.

Trial Examiner Scharnikow: Read the question.

(The question was read.) [398]

The Witness: No.

Q. (By Mr. Purver): Well, between Big Bear and Los Angeles, on your return back from your

(Testimony of Alfred George Cody.)

vacation, did you make any stops? A. Yes.

Q. Where did you stop? A. Fontana.

Q. What for? A. Gasoline.

Q. Was there any discussion about a strike at the gasoline station?

A. Only that there was a strike on.

Q. Were you told among what employees of what companies? A. They didn't know.

Q. Merely that there was an oil strike on?

A. Yes.

Q. Did you ask any details?

A. I asked if there was a strike on against The Texas Company, that I was in one of their stations.

Q. What were you told? A. No.

Q. Do you know when the strike vote was taken among the employees of The Texas Company?

A. Yes.

Q. What date?

A. August 31st and September 1st, 1948. [399]

Trial Examiner Scharnikow: The witness doesn't know.

Mr. Purver: I asked him if he knew and he said yes.

Trial Examiner Scharnikow: It is apparent from his testimony that he wouldn't have known personally.

Mr. Purver: Not at that time.

Trial Examiner Scharnikow: And after that, only by hearsay.

Mr. Purver: That is correct, sir. I am going to ask him how he knows, and, if necessary, I can offer

(Testimony of Alfred George Cody.)

testimony or perhaps we can have a stipulation as to the date of the taking of the strike vote. Will counsel stipulate that the strike vote was taken on August 31st and September 1st? [400]

Mr. Brooks: I can't stipulate to that. I don't know. I didn't object, but I see no materiality. If it would take less time to let him answer the question, I wouldn't object.

Mr. Purver: Well, I intend to offer testimony to that point. I was really leading up to a stipulation. If there is any motion to strike that question, I will not object to it.

Trial Examiner Scharnikow: Shall it be struck or shall we leave it stand?

Mr. Brooks: I have no objection to its standing.

Q. (By Mr. Purver): Did you take part in the three years prior to 1948 in any strike vote elections?

A. Yes.

Q. Describe them.

Mr. Brooks: Mr. Examiner, I would like to inquire the purpose and materiality of the inquiries regarding the strike vote in 1948 and the strike vote in 1945. I fail to see the relevancy.

Trial Examiner Scharnikow: What do you have to say on that?

Mr. Purver: I would like to show that even though strike votes were held and strikes approved, that for at least three years prior to 1948 no strike took place in spite of those votes, so that in this case it would be impossible for this witness to have known beforehand that a strike was going to take

(Testimony of Alfred George Cody.)

place because even if there was a strike vote, it still [401] wouldn't have meant that there would be a strike, as his experience three years prior to that would show.

Trial Examiner Scharnikow: He testified first that he didn't know anything about the strike so far as The Texas Company was concerned until he got back.

Mr. Purver: That is right, and I want to establish his credibility.

Trial Examiner Scharnikow: And he has also testified that he had no information from which he might have known there was a strike at The Texas Company.

Mr. Purver: Well, what I really intended to do is to go a step further and show that he couldn't have known.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Purver: I would like to make an offer of proof that the witness, if permitted to testify, would testify that in at least three prior years after the strike votes had actually been taken, that up to and including the time of the deadline of the strike no strike took place, and that thereafter——

Mr. Brooks: We will stipulate that no strikes took place between 1945 and 1948.

Mr. Purver: And that strike deadlines were set? That strike deadlines were set?

Mr. Brooks: I don't know about that.

(Testimony of Alfred George Cody.)

Mr. Purver: Will you accept the stipulation insofar as it goes? [402]

Mr. Brooks: Yes.

Mr. Purver: I will point out that strike deadlines were set.

Trial Examiner Scharnikow: By affirmative strike votes?

Mr. Purver: By affirmative strike votes.

Trial Examiner Scharnikow: I have got a stipulation, of course, which I will accept to there having been no strikes.

On the further offer of proof that strike votes were taken and deadlines fixed, thereby——

Mr. Purver: And that no strikes were taken.

Trial Examiner Scharnikow: Do you object?

Mr. Brooks: I will not object.

Trial Examiner Scharnikow: I will accept the offer, then.

Q. (By Mr. Purver): Mr. Cody, did you participate in strike vote elections during 1946 and 1947? A. Yes.

Q. Do you know the results of those votes?

A. Yes.

Q. Did the membership vote to go out on strike on those two occasions? A. Yes.

Q. Did they go out on strike?

A. In '46 and '47?

Q. Yes. [403] A. No.

Q. Was a deadline set each time? A. Yes.

Mr. Brooks: Mr. Examiner, may I inquire at this time if the only purpose of the questions and

(Testimony of Alfred George Cody.)

answers regarding the taking of strike votes in 1946 and 1947 and the testimony that no strikes occurred during those years is to establish that this witness might not have known that a strike was started in September, 1948, despite the fact that he knew a strike vote had been taken?

Mr. Purver: Well, he did not know that a strike vote had been taken in 1948.

Mr. Brooks: May I inquire what the purpose of it is, then?

Trial Examiner Scharnikow: Well, that was a subject of discussion, at least implicitly, when the offer of proof was made.

Mr. Purver: Would you like me to clarify—

Trial Examiner Scharnikow: In other words, we have testimony which I accepted under your offer, there being no objection, that in spite of affirmative strike votes, no strike took place.

Mr. Purver: That is right.

Trial Examiner Scharnikow: My understanding of the purpose of that was, although you denied that the witness at [404] the time knew there had been a strike vote taken, that is, before he came back and made this telephone call prior to going to work, that even if he had known a strike vote had been taken he still wouldn't have any reason to believe that a strike had actually started.

Mr. Brooks: And I did not object on the assumption it was for that limited purpose.

Mr. Purver: That is the purpose.

Q. (By Mr. Purver): Now, you were asked by

(Testimony of Alfred George Cody.)

Mr. Brooks, Mr. Cody, why you telephoned Mr. Jones upon your return. Can you explain whether there was any reason for that?

A. Yes, because there was a request in the contract, and I assumed that it was the same in the managerial end, because I hadn't been up there too long, that a person going away from their regular classifications for any reason must give the company at least 12 hours notice before they returned.

Q. And you had done that in the past?

A. Yes.

Mr. Purver: I will ask the reporter to mark for identification as General Counsel's Exhibit No. 26, a document written in pencil, on the top of which the words "Schedule, 9-13 - 9-19," the name George Cody, over the initials of F. A. J."

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 26 for identification.) [405]

Q. (By Mr. Purver): I will hand you what has been marked for identification as General Counsel's Exhibit No. 26, Mr. Cody, and ask you what it is.

A. It is a schedule that was given to me for the 24 hour patrol work that the company was carrying on on my return from my vacation.

Q. Who gave it to you?

A. It was delivered to my house.

Q. By whom? A. Mr. Letson.

Q. Do you recognize the initialing on that?

A. Yes, sir.

(Testimony of Alfred George Cody.)

Q. Whose initials are they?

A. F. A. Jones.

Mr. Purver: I now offer General Counsel's Exhibit No. 26 in evidence.

Mr. Brooks: No objection.

Trial Examiner Scharnikow: General Counsel's Exhibit 26 is admitted in evidence.

(The document heretofore marked General Counsel's Exhibit No. 26 for identification was received in evidence.)

Q. (By Mr. Purver): Are these part of the instructions you received regarding your work assignment? A. Yes, sir.

Q. And on the 13th of September? [406]

A. No, I received them before the 13th.

Q. Your work assignment for the 13th of September? A. Yes.

Q. Were there any other instructions that you received prior to your going back to work on the 13th of September?

A. Accompanying this was the pass that I gave you.

Q. When you appeared at L. A. Headquarters, in accordance with this schedule, did you receive any instructions as to what to do?

A. Yes, I was given a little black book by the fellow that I relieved and it showed me what they were doing about calling in the dispatcher every two hours, I believe we were supposed to call in, and the checking, what they were doing. I followed the procedure they had been following.

(Testimony of Alfred George Cody.)

Q. And you rode the line for how long?

A. I was riding the line and checking stations all night.

Q. For how many days? A. Five there.

Q. During the course of riding the line and checking the stations were you in a position to see whether there were any gaugers, testers or pumpers at work?

A. Yes.

Q. Were there any gaugers, pumpers or testers at work? A. I never saw any.

Q. Do you remember the occasions when you reported to [407] Dreyer that coming through the picket line someone called out that the company should not try to bring people into the picket line?

Mr. Brooks: Mr. Examiner, that was testified to on direct examination and not covered on cross. I object as improper redirect.

Trial Examiner Scharnikow: Are you going further than your direct on this, or are you simply repeating?

Mr. Brooks: Unless there is some foundation laid——

Mr. Purver: My notes show this is on cross examination. I want to clear it up.

Trial Examiner Scharnikow: Let me hear the question.

(The question was read.)

Trial Examiner Scharnikow: I will overrule the objection. You may answer.

The Witness: Yes.

(Testimony of Alfred George Cody.)

Q. (By Mr. Purver): How did you pass through the picket line? A. In the company car.

Q. In a car? A. Yes.

Q. There has been a great deal of testimony about running pickets and strappings. Tell us clearly what a run ticket is.

A. I think the simplest way to say it, it is a bill of sale showing the gauges, temperatures, cuts and the witnesses as to [408] their correct ability.

Q. And what is a strapping?

A. A strapping might be better known as a table by which you convert the foot and inches of the gauges on the run ticket into barrels.

Q. Now, is the movement of oil described by run tickets and strappings? A. Yes.

Q. What is the relation of a strapping to a run ticket, if any? A. It shows that——

Q. What shows, the strapping?

A. The strapping shows the amount of oil that is in a tank by a gauge that is read on the tape of the oil in the tank. The reason that the table is used is to make it simpler for the people making out the run tickets. There is a strapping made for each tank.

Trial Examiner Scharnikow: There is a different table or strapping for each different size tank, is that it?

The Witness: No, for each and every tank, regardless of size.

Q. (By Mr. Purver): In other words, when a tank is repaired, is a new strapping or table set up for its capacity? A. Yes.

(Testimony of Alfred George Cody.)

Trial Examiner Scharnikow: This tank you are talking [409] about now might be a tank where the oil is initially collected as it comes from the well, is that it?

The Witness: It could be that or it could be storage tanks, any place The Texas Company has tanks, or if they have been on the lease long enough to have been filled with oil, they are usually strapped at that time and deductions for dead wood on the inside of the tank are calculated on this strapping so it reflects a true picture of how much oil is in the tank at a given temperature.

Mr. Purver: I now ask the reporter to mark for identification General Counsel's Exhibit No. 27, being a letter addressed to Mr. George Cody, over the signature of Mr. O'Connor, division manager, Refining Department, Pacific Coast Division.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 27 for identification.)

Trial Examiner Scharnikow: Is there any date on that?

Mr. Purver: The 24th of September.

Mr. Brooks: We will stipulate that this letter bears Mr. O'Connor's signature and it was sent to Mr. Cody.

Mr. Purver: I so accept it.

Mr. Brooks: We offer to stipulate that this same letter went to one other supervisor, and that it went to those two supervisors by mistake.

(Testimony of Alfred George Cody.)

Mr. Purver: I am willing to stipulate it went to the [410] two supervisors, but no further than that. I am willing to accept that part of the stipulation.

Mr. Brooks: All right.

Q. (By Mr. Purver): Mr. Cody, I ask you whether you received General Counsel's Exhibit No. 27?

A. Yes.

Mr. Purver: I offer it in evidence.

Trial Examiner Scharnikow: Any objections?

Mr. Brooks: It is objected to as irrelevant and immaterial. It may have, Mr. Examiner, a limited purpose which if stated by counsel might make it material and relevant, but I see no relevancy.

Mr. Purver: I think it is highly relevant on its face, that that document should have been sent to Mr. Cody specifically, and then on the same day that the company sent out a letter which I will also later on put into evidence, saying that they are going to resume operations and that they fired him. I think it ties in very closely.

Trial Examiner Scharnikow: I don't see the purpose. This man was a supervisor.

Mr. Purver: Even though a supervisor he was sent the notice that was sent ordinarily to the non-supervisory employees. I think it is very significant.

Trial Examiner Scharnikow: How?

Mr. Purver: In that this supervisor wasn't even [411] receiving the same treatment of the supervisors. He was treated, as far as that letter was con-

(Testimony of Alfred George Cody.)

cerned, as a nonsupervisory employee. I think it is part of the possibility that everything was pointed towards a showdown with this witness.

Trial Examiner Scharnikow: You are objecting, Mr. Brooks?

Mr. Brooks: I would object that it is highly far-fetched, that there is no foundation for such purpose, that it is therefore irrelevant and immaterial, that it is incompetent proof for the purpose counsel has stated.

Trial Examiner Scharnikow: Well, it is a statement by the respondent to this witness concerning the strike.

Mr. Purver: The company policy.

Trial Examiner Scharnikow: The witness was not at the time an employee, but according to his testimony he later applied for employment as a rank and file employee.

I will take it. I will overrule the objection. General Counsel's Exhibit No. 27 is admitted in evidence.

(The document heretofore marked General Counsel's Exhibit No. 27 for identification was received in evidence.)

Q. (By Mr. Purver): If oil wasn't being run or produced, would there be any occasion for gauging or sampling to be done? A. I didn't get that.

Mr. Purver: Read that question, please.

(The question was read.)

The Witness: Yes. [412]

(Testimony of Alfred George Cody.)

Q. (By Mr. Purver): What are those occasions?

A. For 1st-of-the-month reports.

Q. And who ordinarily takes those reports, makes them?

A. The gaugers and pumpers and head pumpers make them, to the dispatcher.

Q. Are these employees covered by the contract?

A. Yes.

Q. That is, they are non-supervisory employees?

A. Yes. [413]

Q. And at the time you were asked to do that work and make that report were these men on strike?

A. Yes.

Q. When was Yorba Linda shut down prior to the strike? When was the last time, if it was?

Mr. Brooks: If you know.

Mr. Purver: If you know.

The Witness: I don't know if I understand your question right. Yorba Linda pump station was shut down over the week ends and started back up the following Monday. Does that answer that question?

Trial Examiner Scharnikow: Just a second.

Mr. Purver: I think I can clear that very easily.

Q. (By Mr. Purver): How often, if you know, was Yorba Linda shut down?

Mr. Brooks: Mr. Examiner, that question is very vague. I object to it for that reason.

Mr. Purver: I will withdraw the question.

Q. (By Mr. Purver): You were asked, according to your testimony, to start up the operations at

(Testimony of Alfred George Cody.)

Yorba Linda. Is that correct? A. In part, yes.

Trial Examiner Scharnikow: That was before you became a supervisor, though, wasn't it?

The Witness: Sir? [414]

Trial Examiner Scharnikow: You were just asked whether you hadn't started up Yorba Linda pumping station before you were asked in September 28th, 1948, to do so?

The Witness: You say I hadn't?

Mr. Purver: Had.

Trial Examiner Scharnikow: You testified, as I understood, that you had in the past started up the pump station there.

The Witness: Yes.

Trial Examiner Scharnikow: You yourself have done that.

The Witness: Yes.

Trial Examiner Scharnikow: Was that before you became a supervisor or after you became a supervisor?

The Witness: Before I became a supervisor.

Q. (By Mr. Purver): Now, how often?

A. At that particular station the days I worked over there they were running about 24 hours a day. At the Signal Hill station I used to shut it down and start it up over the week ends as a No. 1 pumper.

Q. And who ordinarily would start the pumps operating? A. The No. 1 pumpers.

Q. And who would fire the boilers?

A. No. 1 pumper.

Q. At Yorba Linda does that apply?

(Testimony of Alfred George Cody.)

A. Yes.

Q. Now, how often would a pumper have occasion to start the [415] boilers at Yorba Linda?

Mr. Brooks: There is no foundation that this witness knows the answer to this question. Furthermore, it is objectionable because it is very ambiguous.

Mr. Purver: Very well, I will withdraw the question.

Q. (By Mr. Purver): Do you know whether Yorba Linda prior to the strike of September, 1948, operated the pumps and the steam engine during weekends?

A. I can answer that before I went on vacation that they did.

Q. Before your vacation of August, 1948?

A. Yes.

Q. It was shut down each week end?

A. They shut down each week end.

Q. And who started them up?

A. The pumpers.

Q. Are pumpers covered by the contract?

A. Yes.

Q. Was that part of the routine operations to shut down each week end and begin the following Monday? A. Yes.

Q. Now, you testified in response to a question by Mr. Brooks that you were a participant in group life insurance. Is that correct? A. Yes.

Q. Now, do you know whether that policy you had as a part [416] of that group life insurance has

(Testimony of Alfred George Cody.)

lapsed since you left the employment of the company?

A. I don't know whether it has or hasn't.

Q. Have you taken any action regarding it one way or the other? A. No.

Q. Now, when you used the words in saying you asked for your job back, the words "a job back," did you ask for any special job? A. No.

Q. Now, how many jobs in the Pipeline Division were there that you hadn't done in your past experience of 20 years with the company?

A. In operations, in the operations end of the Pipeline Division I did everything but ride line and I did that partially as a gauger.

Q. In other words, when you asked for a job back, that meant any job that you had done before. Is that it?

Mr. Brooks: That is objected to——

Trial Examiner Scharnikow: Sustained.

Q. (By Mr. Purver): In your second conversation with Mr. Dreyer late in November, 1948, did you set up any conditions whatsoever regarding returning to work? A. No. [417]

* * * * *

Recross Examination

Q. (By Mr. Brooks): Well, I understood you to testify that there were three classifications of employees who would normally gauge tanks, as requested of you on September 28th, and that those three were pumpers, gaugers and head pumpers. I want to be sure what your testimony is in that re-

(Testimony of Alfred George Cody.)

gard. A. Gaugers and pumpers.

Q. If you said head pumpers, you did not intend to, is that right? A. That's right.

Q. You did, according to your testimony on re-direct, every kind of work in the pipe line division in the operations end, except line riding. Is that right?

A. That's job classifications under the contract?

Q. Yes. A. Yes.

Q. But you did do line riding work between September 13th and September 28th, did you not? [422]

A. With a permit by the union to do so, yes. [423]

* * * * *

HERBERT S. BEAN,

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Purver): What is your full name, sir?

A. Herbert S. Bean.

Q. What is your address?

A. 2759 Easy Avenue, Long Beach.

Q. Are you presently employed?

A. By The Texas Pipe Line Department.

Q. In what capacity?

A. Relief dispatcher and oil clerk.

Q. In what capacity were you employed by The Texas Company in the early part of September?

A. No. 1 pipefitter.

Trial Examiner Scharnikow: That is September, '48?

(Testimony of Herbert S. Bean.)

Mr. Purver: September, '48, yes.

The Witness: Yes. [424]

Q. (By Mr. Purver): Did you go out on strike on September 3rd? A. I did.

Q. In what department of the company were you at the time you went out on strike?

A. Pipe line department. [425]

* * * * *

Trial Examiner Scharnikow: Both of you have told me there is no dispute but that the company intended to resume operations at the time Dreyer and Cody and Jones spoke on September 28th. Now you are telling me that General Counsel's Exhibit 28 is simply to show that by this exhibit. Is that all you have in mind?

Mr. Purver: Yes.

Trial Examiner Scharnikow: There is no dispute about it.

Mr. Brooks: No, but I object to the letter going into the record because it is cumulative, it is irrelevant, immaterial, if it is only for that purpose. Does counsel contend that the company violated the law by starting operations?

Mr. Purver: No.

Mr. Brooks: In the early part of October?

Mr. Purver: No, that is not part of our contention. [429]

* * * * *

Q. (By Mr. Purver): Mr. Bean, in the early part of September, 1948, were you a member of any union committee?

(Testimony of Herbert S. Bean.)

A. I was on the workmen's committee, the pipe line department.

Q. At the very beginning of the strike, which is September 3rd or 4th, 1948, did your committee have any conference with any representatives of management?

A. The night of the strike we met in Mr. Jones' office—is that what you are referring to?

Q. Yes.

A. There was another committeeman besides myself present and Mr. Jones——

Trial Examiner Scharnikow: Who was the other committeeman?

The Witness: Clarence Gunning of the pipe line.

* * * * *

[430]

Trial Examiner Scharnikow: What date would that be?

The Witness: It was the deadline night. It was midnight. What was that, September 3rd, 4th? I don't know.

Q. (By Mr. Purver): The best you remember, it is either the 3rd or 4th of September?

A. Yes, that is right, either the 3rd or 4th.

Q. What was the discussion?

A. We were discussing qualifications as to who would get picket line passes, the reason for certain individuals, and it amounted to issuing passes to supervisors in all capacities, which would include or did include, as well as I can remember, all employees that weren't under the contract, junior engineers and head pumpers, firemen, it was—well,

(Testimony of Herbert S. Bean.)

naturally, the strike was in effect and we weren't going to issue passes to anybody.

Trial Examiner Scharnikow: Just tell us what the discussion was, Mr. Bean. [431]

The Witness: Well, that was what the discussion was in the course of the evening there. I couldn't quote it exactly because it was back and forth. One of the other committeemen objected to giving a pass to one of the men that was out from under the contract, so that is the only reason. That brings back the memory that we discussed the only reason we would issue passes to individuals would be because there would be no work done at that time by them.

Q. (By Mr. Purver): Now, who was it that said that?

A. That is too long ago. All I can remember is it was just discussed there by the three of us.

Q. Was anything said specifically about the work that was to be done by people who received passes?

A. No, there wasn't any work. It was for safety, fire, and other reasons for the protection of the properties of The Texas Company.

Q. Did you issue any such passes thereafter?

A. Yes.

Q. Do you remember how many?

A. No, I don't.

Q. Were those passes ever revoked?

A. Yes, they were revoked. Well, those passes were written out in long-hand and then after they were later superseded by mimeographed passes, and

(Testimony of Herbert S. Bean.)

in the course of time when operations were started by the company, they were all revoked. [432]

Q. All in the Pipeline Division?

A. Yes, just the Pipeline.

Q. Were they called in?

A. They were told as they were met at the gate—that is, when they came through the gate, they were told their passes were no longer any good—either picked up or destroyed.

Cross Examination

Q. (By Mr. Brooks): The union issued these passes, Mr. Bean?

A. Well, as a work member on the Workmen's Committee, I acted for the union.

Q. For the union? A. Yes.

Q. Give us just a brief statement of what the Workmen's Committee is.

A. They are members who are elected by vote of the employees of the Pipeline Department to represent them on the grievances and health and safety and other measures that come up during the month, as stated by the contract, to meet with the company the first Tuesday of each month.

Q. Then, the Workmen's Committee is the group representing the union which deals with management periodically on various matters that might come up concerning working conditions. Is that right? A. We represent the employees. [433]

Q. That is right, and you are elected by the employees who are in the Oil Workers International

(Testimony of Herbert S. Bean.)

Union, Local 128? A. That is right.

Q. You were the chairman of that committee at that time. Is that right? A. That is right.

Q. And was that in September of 1948?

A. Yes, sir.

Q. Since that time you have been promoted, have you not? A. Yes.

Q. When were you promoted?

A. Well, I was on a break-in basis there for a while. I don't remember the exact date. Well, let's see, maybe we ought to put it this way: I accepted the promotion the third week in August. I don't remember the exact day. I believe it was on a Thursday.

Q. About the third week in August?

A. Yes.

Q. And the job that you were promoted to and now hold is outside the bargaining unit? A. Yes.

Q. That is August, 1949? A. Yes.

Trial Examiner Scharnikow: I have one or two questions. [434]

At this meeting on the night of September 3rd or 4th you discussed the issuance of passes with Mr. Jones?

The Witness: Yes.

* * * * *

Trial Examiner Scharnikow: Was there an agreement as to what kind of work could be done by pass-holders?

The Witness: There was an agreement that there would be no movement of oil. I wouldn't want to

(Testimony of Herbert S. Bean.)

state those exact words. Well, maybe I should put it another way. Well, there just wouldn't be any work done, period.

Trial Examiner Scharnikow: Was there any discussion of why the passes were to be issued to anybody?

The Witness: Yes. The reason the passes were being issued was to make a clean—well, just a clean feeling going through the picket line to keep various supervisors that were former members of the union, or workers and others, from feeling like they were just breaking through the picket line, so to speak.

Trial Examiner Scharnikow: Well, wasn't there any discussion of why passes should be issued at all; that is, [435] why these men should go through the picket line at all?

The Witness: Well, yes. The reason for—well, the sole purpose for issuing the passes to the supervisors—as I remember, we discussed the fact, and Mr. Jones stated, representing the company, that it was for safety and fire and other necessary measures to protect the property of The Texas Company.

* * * * *

Trial Examiner Scharnikow: Was there any discussion whether there would be any movement of oil by the company?

The Witness: I don't recall. I can't recall whether there was or wasn't. Well, the statement I previously made was the reason the picket line passes were issued, was on [436] the basis there would be no

(Testimony of Herbert S. Bean.)

movement of oil or work done by these people.

Trial Examiner Scharnikow: Did anybody say that, that there would be no movement of oil?

The Witness: That is hard to pin down. I couldn't honestly say whether it was or not. [437]

* * * * *

Trial Examiner Scharnikow: In connection with the supervisory passes, did you discuss what the supervisors were [447] going to do during the strike?

The Witness: I don't believe we went into any detail. A lot of things were understood without being said, due to the fact——

Trial Examiner Scharnikow: There was no discussion about it then?

The Witness: No. [448]

* * * * *

Trial Examiner Scharnikow: Did you speak about the revocation of passes at this conference on September 3rd or September 4th?

The Witness: The best I can remember is, should there be any work done by the supervisors, the passes or pass would be revoked from that individual or individuals.

Trial Examiner Scharnikow: Now, that is what you said, is that right? That was what you or Gunning said?

The Witness: Yes.

Trial Examiner Scharnikow: What, if anything, did Jones say to that, if you can remember?

The Witness: I don't believe there was a statement. [449]

* * * * *

JOHN B. SUMMERFELT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Purver): What is your full name, please?

A. John B. Summerfelt. [540]

* * * * *

Q. (By Mr. Purver): At the time immediately prior to the strike, what was your job with the company?

A. I was working as a well puller and doing relief work as a head well puller in the producing department, that is, the field. [541]

* * * * *

Cross Examination (Continued)

Q. (By Mr. Brooks): Mr. Summerfelt, when were you first elected to the Workmen's Committee?

A. It was about two years ago in June, I believe it was. [746]

* * * * *

Q. The strike was called by Local 128 and the International, was it not?

A. That is right. [837]

* * * * *

ELMER L. DREYER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Brooks): State your name and address, please, Mr. Dreyer.

A. Elmer L. Dreyer, D-r-e-y-e-r, 3753 Pacific Avenue, Long Beach 7, California.

Q. What is your present position and employment?

A. I am superintendent of the pipe lines on the Pacific Coast for The Texas Company.

Q. How long have you been in that position?

A. Since January 1, 1932.

Q. How long have you been with The Texas Company?

A. Since August 13, 1925.

Q. Were you in your present position all during 1948?

A. I was.

Mr. Brooks: I will ask the reporter to mark a chart as Respondent's Exhibit 14 for identification.

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 14 for identification.)

Q. (By Mr. Brooks): Mr. Dreyer, I am showing you a chart [2475] marked Respondent's Exhibit No.

(Testimony of Elmer L. Dreyer.)

14 for identification and ask you if you had this prepared at my request.

A. Yes, that chart was prepared under my direction at your request.

Q. This chart indicates that it is an operating and maintenance organization chart. What, if anything, is omitted in the organization of the pipe line division from this chart?

A. This chart shows only the operating and maintenance organization in the Los Angeles district; does not include the operating organization in the Ventura, Coalinga, or Fellows districts, nor does it include the office group.

Q. Are the office employees excluded from the bargaining contract in the pipe line division?

A. They are.

Q. Are all other positions indicated on this chart excluded from the bargaining unit?

A. No, this chart shows some occupations that are included in the bargaining unit.

Q. Where are the classifications which are included in the bargaining unit?

A. The occupations that are included in the bargaining unit are in the two blocks headed by the word "Supervise" and are listed by occupations with no names of the employees shown.

Q. That is to indicate the classifications of em-

(Testimony of Elmer L. Dreyer.)

ployees [2476] supervised by those people immediately above; is that correct?

A. That is correct.

Mr. Brooks: I offer into evidence Respondent's Exhibit No. 14.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit 14 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 14 for identification was received in evidence.)

(Testimony of Elmer L. Dreyer.)

Q. (By Mr. Brooks): Briefly and generally, Mr. Dreyer, what is the function of the pipe lines division of the refining department?

A. The functions of the pipe lines division of the refining department are to collect the oil or gather in the field as produced from tanks into which it is produced by the oil wells; to collect it into storage tanks; transport the oil to the refinery as needed. We also in some instances dehydrate wet crude, that is, crude that contains water in an emulsified form. We remove the water to put the crude in the so-called dry state. We also transport natural gasoline through pipe lines from natural gasoline plants, deliver it to the refinery.

Q. There is in evidence as General Counsel's Exhibit No. 21 a map which indicates the divisions in the producing department of the Pacific Coast division, which I will now show [2477] you and ask you to tell us whether or not your jurisdiction in the pipe line division is co-extensive at all and, if so, to what extent with these producing districts.

A. The pipe line division districts are the same as the producing department, the Los Angeles Basin district, the Ventura district, the Fellows district and the Coalinga district. The pipe line division has no operations in the Sacramento district or the Humboldt district.

Q. Does your jurisdiction extend to those districts where the pipe line division does operate?

A. Yes, it does.

Mr. Brooks: I will ask the reporter to mark as

(Testimony of Elmer L. Dreyer.)

Respondent's Exhibit 15 for identification a flow chart designated at the bottom, "Diagram, Pipe Line Operations."

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 15 for identification.)

Q. (By Mr. Brooks): Mr. Dreyer, did you have, under your direction and at my request, a chart prepared, indicating briefly the operations of the pipe line division? A. I did.

Q. I show you what has been marked as Respondent's Exhibit No. 15 for identification and ask you if that is the chart you had prepared?

A. It is.

Q. And so that the record will be clear regarding the [2478] respective jurisdiction regarding the pipe line division, the refinery, and the producing department, will you just describe very briefly, using the chart, the beginning and end of the jurisdiction and the operations carried on by the pipe line division, starting at the top of the chart?

A. On this chart has been indicated an oil well, its flow line, and a lease shipping tank.

Q. Where are the lease shipping tanks located?

A. These shipping tanks, and the oil wells, are located on the leases and are under the jurisdiction of the producer or producing department in the case of The Texas Company. Connected to that lease shipping tank is a valve, which is indicated by "X" on this diagram, and to that valve is connected a pipe

(Testimony of Elmer L. Dreyer.)

line which is under the jurisdiction of the pipe line department. The next item——

Q. Just a moment. Where does the jurisdiction of the pipe line division begin?

A. The jurisdiction of the pipe line division generally begins at that valve which I have already indicated.

Q. Is the shipping pump operated by the pipe line division?

A. The shipping pump is owned and installed by the pipe line division, but it is generally operated by the producing department pumper. It is maintained by the pipe line.

Q. But the pumper is usually in the producing department? [2479]

A. Usually in the producing department. It operates the pump.

Q. Go ahead.

A. From the shipping department there is a gathering line under the jurisdiction of the pipe line, leading to a pump station or storage tank farm tanks which are under the jurisdiction of the pipe line. From that point we have main line pumps and a main line through which we deliver the crude to the refinery, the pipe line's jurisdiction ending at the refinery fence.

As indicated on the second line of this diagram, we in some instances have dehydrator plants that are under pipe line jurisdiction, in which case the oil is delivered to the dehydrator plant, dehydrated, and from this plant it may be delivered by main line

(Testimony of Elmer L. Dreyer.)

pumps either to storage tanks or directly to the refinery.

Q. For what kind of oil is a dehydrator plant installed?

A. A dehydrator plant is installed and operated to dehydrate so-called wet crude. By wet crude, I mean crude oil that is emulsified with water as produced from the well and it is necessary to remove this water before the refinery can handle the crude.

The third line we have indicated a gathering line direct to the refinery, because in some instances we do deliver direct from the field to the refinery without going through any pipe [2480] line storage tanks or pump line stations.

On the bottom line has been indicated the natural gasoline pipe line through which we, that is, the pipe line division, deliver natural gasoline to the refinery.

Q. Do you have pipe lines running from Plant 5 of natural gasoline? A. We do.

Q. Do you have them from Plant 14?

A. We do.

Q. Do you have them from Plant 9?

A. The line from Plant 14 and 9 is one line, both plants delivering through the same line.

Mr. Brooks: I offer into evidence Respondent's Exhibit No. 15.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit 15 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 15 for identification was received in evidence.)

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: May I ask one question?

Mr. Brooks: Yes, sir.

Trial Examiner Scharnikow: You transport gas from the field to the gasoline plants, do you?

The Witness: We do not transport the gas from the field to the gasoline plants. [2481]

Trial Examiner Scharnikow: By whom is that done?

The Witness: That is done by the gasoline division.

Q. (By Mr. Brooks): There is in the record, Mr. Dreyer, the fact that a strike occurred on September 4, 1948, among the employees of the operations of The Texas Company in Southern California, and that such strike affected the pipe line division employees.

Were you on duty on September 4th?

A. I was on vacation on that day.

Q. When did you return from vacation during that time? A. September 7th.

Q. Did you yourself personally have any conversations with any union representatives or employee representatives prior to or in the early stages of the strike regarding passes or cessation of operations?

A. I did not.

Q. Who was functioning in your absence?

A. Mr. F. A. Jones, assistant superintendent, pipe line division.

Q. For purposes of clarity, Mr. Dreyer, the flow

(Testimony of Elmer L. Dreyer.)

chart, which is Respondent's Exhibit 14, applies to only the L. A. Basin district, does it?

Trial Examiner Scharnikow: The flow chart?

Mr. Brooks: Yes.

Trial Examiner Scharnikow: That is No. 15.

Mr. Brooks: That is right.

The Witness: Some of the employees shown on that chart also have functions in other districts.

Q. (By Mr. Brooks): No, I beg your pardon, I am talking about 15, which is the flow chart of operations. What district does that cover, or districts if there is more than one.

A. That applies generally to all districts.

Q. If there are gasoline——

A. If there are all those operations in the district.

Q. In other words, the method of operation is substantially the same if all of these functions are present?

A. That is correct.

Q. The calendar for 1948, for September, indicates that the 7th was on a Tuesday. Is that your recollection of the day that you returned to the plant, or where you return on that day?

A. It is my best recollection that I returned to work in my office on September 7th, the day following Labor Day. It is possible I came back on Labor Day, but I do not believe so.

Q. What was the situation so far as you found it regarding operations of the pipe line division upon your return on or about September 7th?

A. I found most of the operations shut down.

(Testimony of Elmer L. Dreyer.)

Q. Was there, if you recall and know, any movement of oil going on at that time, namely, September 7th? [2483]

A. There were some movements of oil in the gathering system of the pipe line division.

Q. Are records kept of the shipments and movements of oil through the pipe line system?

A. Yes, very detailed records are kept.

Q. Have you checked the records for the month of September regarding the movements and shipments through the pipe line gathering facilities, that is September, 1948?

A. I have checked those records carefully for the L. A. Basin district. [2484]

Q. Just for the one district?

A. The one district.

Q. Did Mr. Cody's duties carry him in 1948 beyond the Los Angeles Basin District?

A. It did.

Q. You stated you have checked the records. Did you make any extract of those records and, if so, what did you do in that regard?

A. I noted from the record all of the gathering operations that were carried on in the Los Angeles Basin during the period September 4th to September 27th, and made a tabulation from the original records. The tabulation was typed under my direction. I checked the typed record back against the original notes, and gave you the copy of the typed record.

Mr. Brooks: I will ask the reporter to mark as

(Testimony of Elmer L. Dreyer.)

Respondent's Exhibit 16 a tabulation headed, "The Texas Company Gathering Operations."

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 16 for identification.)

Q. (By Mr. Brooks): Can you identify this document which is marked Respondent's Exhibit 16?

A. Yes, this is the two-page tabulation typed under my direction showing the gathering operations in the Los Angeles Basin District from the period September 4th to September 27th, 1948. [2485]

Q. Is this the one that you personally checked against the original records? A. It is.

Q. Referring now to this chart, at the left-hand column after the first one, which indicates the date, is shown "Producer." What are the facts regarding the normal practice as to transport of oil by producers other than The Texas Company? In other words, do you or do you not normally transport oil for producers other than The Texas Company?

A. In many instances The Texas Company purchases crude from other producers. We transport it for The Texas Company. We seldom transport it for other people, however.

Q. Then these companies or individuals indicated on the second column on the left indicate the producer of the oil and from whom The Texas Company procured it. Is that correct?

A. That is correct.

(Testimony of Elmer L. Dreyer.)

Q. What does the second column mean? That would be the third column.

A. The third column is the lease name or other identification of the producer. Many producers from whom we purchase oil have numerous leases, and that column identifies which particular property or lease the oil in question as shown on this tabulation was shipped.

Q. The third column, then, means the sources of that oil. Is that correct? [2486]

A. That indicates the oil field from which it was shipped.

Q. That is the fourth column showing the field?

A. That is the fourth column, correct.

Q. I notice in the middle column you have indicated, "Gauged And/Or Sampled And/Or Tested By." What if any other normal so-called production type work is performed in connection with shipment and movement of oil in this fashion besides what you have indicated, namely, gauged, sampled, or tested?

A. The only other operation would be the actual shipping of the oil, the operation of the shipping pump.

Q. The operation of the pump?

A. That is correct.

Q. Then you have indicated in the column to the right of the middle one who operated the pump. Is that correct?

A. That is correct.

Q. What is a run ticket and its functional purpose?

A. A run ticket is a form on which blank spaces

(Testimony of Elmer L. Dreyer.)

are provided and in which spaces figures are recorded showing the amount of oil, the gauge, and the temperature, quality of the crude, producer's name, the field from which it is shipped, and all other data necessary to compute the amount to be paid for the crude shipped.

Q. What is meant by the last column on the right, "Facilities Used"? [2487]

A. That column shows whether or not it was Texas Company gathering lines, pumps, or any other equipment that may have been used to ship the oil indicated in the previous columns.

Trial Examiner Scharnikow: That, of course, is on Respondent's Exhibit 16 for identification?

Mr. Brooks: Right, sir.

I offer Respondent's Exhibit 16 into evidence.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit 16 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 16 for identification was received in evidence.)

THE TEXAS COMPANY GATHERING OPERATIONS
LOS ANGELES BASIN
SEPTEMBER 4 TO 27, 1948, INCLUSIVE

Date Sept. 1948	Producer	Lease Name or Other Identification	Field	Gauged and/or Sampled and/or Tested by	Pump Operated by	Texas Co. Run Ticket Issued or Signed by	Facilities Used
17	Davis Investment Co.	Well No. 19	Signal Hill	J. R. Letson	Davis Investment Co. Employee	J. R. Letson	Texas Co. gath. pump & line
24	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
24	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
25	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
25	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
26	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
26	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
27	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
27	Jergins Oil Co.	City	Signal Hill	J. R. Letson	Jergins Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
16	The Texas Company	Redondo Improve. Co.	Torrance-Redondo	Stand. Oil Co.	Texas Co. Prod. Dept. Employee	A. Payse	Texas Co. gath. pump & line
22	The Texas Company	Redondo Improve. Co.	Torrance-Redondo	Stand. Oil Co.	Texas Co. Prod. Dept. Employee	A. Payse	Texas Co. gath. pump & line
22	Zenith Oil Co.	Petifils	Torrance-Redondo	Stand. Oil Co.	Zenith Oil Co. Employee	None	Texas Co. gath. line— Zenith Oil Co. Pump
26	The Texas Company	Redondo Improve. Co.	Torrance-Redondo	Stand. Oil Co.	Texas Co. Prod. Dept. Employee	A. Payse	Texas Co. gath. pump & line
4	British Amer.-Texas Co.	Park Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
5	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
5	British Amer.-Texas Co.	Park Bodger	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
6	British Amer.-Texas Co.	Village Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
8	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
10	British Amer.-Texas Co.	Park Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
10	British Amer.-Texas Co.	Village Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
11	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
12	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
12	British Amer.-Texas Co.	Park Bodger	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
14	British Amer.-Texas Co.	Park Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
14	British Amer.-Texas Co.	Village Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
15	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
16	British Amer.-Texas Co.	Park Bodger	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
19	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
19	British Amer.-Texas Co.	Village Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
21	British Amer.-Texas Co.	Park Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
23	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
23	British Amer.-Texas Co.	Park Bodger	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
23	British Amer.-Texas Co.	Village Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
24	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
24	British Amer.-Texas Co.	Park Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
25	British Amer.-Texas Co.	Bodger No. 1 and No. 3	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
26	British Amer.-Texas Co.	Village Community	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
27	British Amer.-Texas Co.	Park Bodger	Alondra	Stand. Oil Co.	British Amer. Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
15	The Texas Company	Moynier	Inglewood	Stand. Oil Co.	Texas Co. Prod. Dept. Employee	A. Payse	Texas Co. gath. pump & line
21	A. T. Jergins Oil Co.	Oscar Howard	Inglewood	Stand. Oil Co.	A. T. Jergins Oil Co. Employee	None	Texas Co. gath. pump & line
27	The Texas Company	Moynier	Inglewood	Stand. Oil Co.	Texas Co. Prod. Dept. Employee	A. Payse	Texas Co. gath. pump & line
8	J. H. Marion	Cole No. 4	Huntington Beach	SoCal*	J. H. Marion Employee	J. R. Letson	Texas Co. gath. pump & line
8	J. H. Marion	Cole No. 4	Huntington Beach	SoCal*	J. H. Marion Employee	J. R. Letson	Texas Co. gath. pump & line
14	The Texas Company	Volmer-Neyers	Huntington Beach	SoCal*	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
14	The Texas Company	Columbia	Huntington Beach	J. R. Letson	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
15	Termo Oil Co.	Termo No. 5	Huntington Beach	SoCal	Termo Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
20	The Texas Company	Brown	Huntington Beach	SoCal	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line

* SoCal—SoCal Oil and Refining Corp.

Respondent's Exhibit No. 16—(Continued)

THE TEXAS COMPANY GATHERING OPERATIONS
LOS ANGELES BASIN
SEPTEMBER 4 TO 27, 1948, INCLUSIVE

Date Sept. 1948	Producer	Lease Name or Other Identification	Field	Gauged and/or Sampled and/or Tested by	Pump Operated by	Texas Co. Run Ticket Issued or Signed by	Facilities Used
20	The Texas Company	Elliott	Huntington Beach	SoCal	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
22	Termo Oil Co.	Termo No. 5	Huntington Beach	SoCal	Termo Oil Co. Employee	J. R. Letson	Texas Co. gath. pump & line
23	The Texas Company	Towers	Huntington Beach	J. R. Letson	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
27	The Texas Company	Pierce	Huntington Beach	SoCal	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
27	The Texas Company	Brown	Huntington Beach	SoCal	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
9	The Texas Company	Krug	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
9	The Texas Company	Krug	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
9	The Texas Company	Bradford No. 1	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
9	The Texas Company	Bradford No. 2	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
10	The Texas Company	Isaac	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
10	The Texas Company	Isaac	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
10	Arrowhead Oil Co.	Bradford	Richfield	J. R. Letson	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
11	The Texas Company	Krug	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
11	The Texas Company	Richfield-Consolidated	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
12	The Texas Company	Yarnell	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
13	The Texas Company	Bradford No. 1	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
14	The Texas Company	Bradford No. 1	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
14	The Texas Company	Krug	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
15	The Texas Company	Bradford No. 2	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
18	The Texas Company	Bradford No. 1	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
19	Arrowhead Oil Co.	Bradford	Richfield	J. R. Letson	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
20	The Texas Company	Yarnell	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
20	The Texas Company	Krug	Richfield	Texas Co. Prod. Dept.	Texas Co. Prod. Dept. Employee	J. R. Letson	Texas Co. gath. pump & line
17	The Texas Company	Wickman	Santa Fe Springs	J. R. Letson	J. R. Letson	J. R. Letson	Texas Co. gath. pump & line
17	The Texas Company	Standlee	Santa Fe Springs	J. R. Letson	J. R. Letson	J. R. Letson	Texas Co. gath. pump & line
17	The Texas Company	Matern No. 2	Santa Fe Springs	J. R. Letson	J. R. Letson	J. R. Letson	Texas Co. gath. pump & line
17	The Texas Company	Foix	Santa Fe Springs	J. R. Letson	J. R. Letson	J. R. Letson	Texas Co. gath. pump & line
17	The Texas Company	Baldwin	Santa Fe Springs	J. R. Letson	J. R. Letson	J. R. Letson	Texas Co. gath. pump & line
21	Juanita E. O'Melia	Seward Rideout	Whittier Hills	J. R. Letson & R. Hight	Gravitated—Valves opened by J. R. Letson	J. R. Letson & R. Hight	Texas Co. gathering line
21	Juanita E. O'Melia	Seward Rideout	Whittier Hills	J. R. Letson	Gravitated—Valves opened by J. R. Letson	J. R. Letson	Texas Co. gathering line
27	Juanita E. O'Melia	O'Donnell No. 1	Whittier Hills	J. R. Letson	Gravitated—Valves opened by J. R. Letson	J. R. Letson	Texas Co. gathering line
27	Juanita E. O'Melia	Seward Rideout	Whittier Hills	J. R. Letson	Gravitated—Valves opened by J. R. Letson	J. R. Letson	Texas Co. gathering line
4	Standard Oil Co.*	G-55 Community	Wilmington	Ray Eaton†	Producer's Employee	Ray Eaton	Stand. Oil Co. and Texas Co. gathering lines

4 Approximately 47 shipments from Jergins Oil Co., Superior Oil Co. and Pioneer Drilling Co. leases in the Wilmington Field were made into General Petroleum Corp. pipe line. Of these, 28 shipments were for account of The
to Texas Company. Branch lines through which deliveries were made into General Petroleum system are owned by The Texas Company, or in some cases 50% by Texas and 50% by Superior Oil Co. Approximately one-half the
27 pumps used are owned by Texas and approximately one-half are owned by Superior, each of these companies using the other's pumps as necessary. Gauging, sampling and testing was done by General Petroleum
employees, and copies of General Petroleum run tickets were picked up by Texas Company employee. This is the regular, usual operation. The only variation was that General Petroleum run tickets were picked up in Sep-
tember, 1948, by J. R. Letson and E. L. Dreyer, whereas these tickets would normally be picked up by a Texas Company Field Gauger.

* Standard received from independent producer and delivered directly from lease to The Texas Company on exchange.

† The Texas Company Field Gauger.

(Testimony of Elmer L. Dreyer.)

Mr. Brooks: I will ask the reporter to mark as Respondent's Exhibit No. 17 for identification a form entitled "The Texas Company Run Ticket."

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 17 for identification.)

Q. (By Mr. Brooks): Mr. Dreyer, I show you Respondent's Exhibit No. 17 for identification, and ask you to tell us what that is.

A. That a Texas Company run ticket.

Q. Is that a form of the run ticket you were just describing a little bit ago? A. It is.

Q. Are copies kept of these run tickets? [2488]

A. Yes.

Q. Describe very briefly, using the ticket that is before you, the manner in which these are prepared and what is done with them.

A. These run tickets are bound in books in sets numbered consecutively, and the books are in the hands of the field gaugers.

Q. Who prepares the run tickets?

A. A run ticket is prepared by the field gauger.

Q. What does he do with it?

A. At each tank to be shipped from the lease, after he has gauged and sampled the tank, he fills out the run ticket, indicating thereon all the data called for on the run ticket, monthly run number, type of crude, shows who the producer is, that is, who we receive the crude from.

Q. Well, that is all shown on the ticket?

(Testimony of Elmer L. Dreyer.)

A. That is all shown on the run ticket. He fills in all that data.

Q. After the gauger prepares that, what does he do with it?

A. The original copy is given to the producer, one copy stays in the book for permanent record, in his run ticket book, the other copies are sent in by the company mail to the office and distributed further from that point.

Q. There are a total of how many copies made out?

A. The run ticket books are printed with five copies in each [2489] set. In some instances additional copies are necessary, and in that event we have extra forms that can be interspaced in the book to make additional copies when more than five are required.

Q. Is each carbon different in color or are they the same?

A. Each carbon is different in color until after you get over the sixth; then the seventh would be the same color as the sixth.

Mr. Brooks: I offer into evidence Respondent's Exhibit No. 17.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit 17 is admitted.

(The document heretofore marked Respondent's Exhibit No. 17 for identification was received in evidence.)

RESPONDENT'S EXHIBIT No. 17

FORM PL-171B 1M BKS. 7-48

THE TEXAS COMPANY

RUN TICKET

Monthly Run No. _____

20426

Oil Type _____

Field _____

Date _____ 194

(RUN STARTED)

Received from _____

For Account of _____

Exchange No. _____

Delivered to _____

The following Oil in bulk of 42 U. S. Gallons per barrel.

TANK No.			Lease			
SIZE			Sec. T. R.			
	FEET	INCHES	GROSS BARRELS		TEMP.	BBLs. AT 60°F
Opening Gauge						
Closing Gauge						
OIL RUN						
B. S. & Water			% Deductions			
NET OIL RUN						

GRAVITY OF TANK SAMPLE				Price
Observed Gravity		A. P. L. at	°F	Per Bbl. \$
Corrected Gravity		A.P.L. at	60°F	Value \$

Steam or Power Furnished By:

Opening Gauge		For
DATE	194	Seller
TIME	M.	For Buyer
Closing Gauge		For
DATE	194	Seller
TIME	M.	For Buyer

CALCULATED BY

VERIFIED BY

ORIGINAL

(Testimony of Elmer L. Dreyer.)

Q. (By Mr. Brooks): What is a strapping report? Reference has been made in the record to strapplings.

A. The strapping report or strapping is a record on which we indicate the measurements of the tank that are taken by engineers to determine the capacity of the tank. Tank strapping is used to prepare the tank table.

Mr. Brooks: I will ask the reporter to mark as Respondent's Exhibit No. 18 a form entitled "The Texas Company Tank Strapplings."

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 18 for identification.) [2490]

Q. (By Mr. Brooks): What is this form which has been marked as Respondent's Exhibit 18 for identification?

A. This form is a copy of The Texas Company Strapplings Report.

Q. For what purpose is that used?

A. That is used for recording the measurements made on a new tank or tank which has had extensive repairs made to it.

Q. Who enters the data on one of these reports?

A. In the Los Angeles Basin District this data is usually entered by an engineer or a junior engineer.

Q. What is done with the information that is on the tank strapping report?

A. That information, or a copy of the tank strapplings report with the information filled in it is

(Testimony of Elmer L. Dreyer.)

mailed to our Houston office, where the tank strapings are used to compute and compare tank tables.

Q. Are tank tables prepared in your office or in your district?

A. No, we do not prepare them here.

Q. Do you have tank tables which are used in your office at all?

A. Yes, we have many tank tables.

Q. What are they made from?

A. Tank tables are made from the tank strapings.

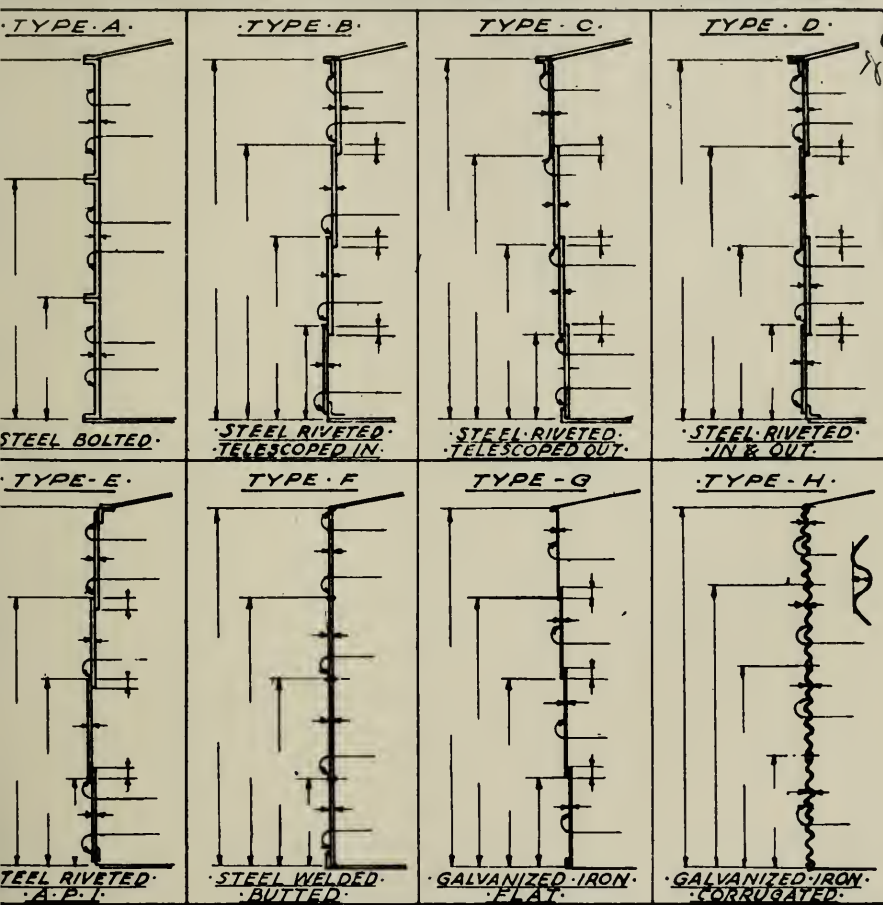
Mr. Brooks: I offer in evidence Respondent's Exhibit 18. [2491]

Mr. Hackler: No objection.

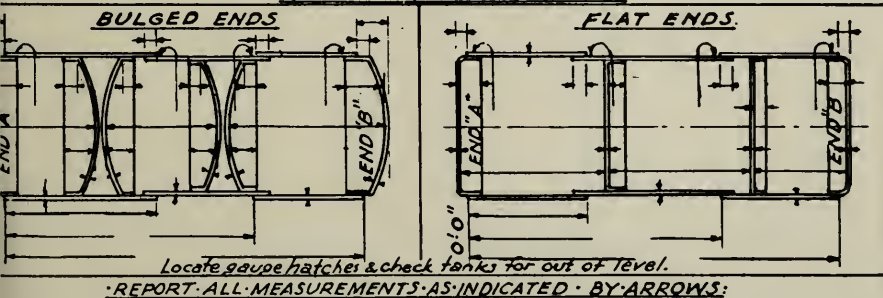
Trial Examiner Scharnikow: Respondent's Exhibit No. 18 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 18 for identification was received in evidence.)

TYPICAL TANK TYPE SHOWING MEASUREMENTS REQUIRED



HORIZONTAL TANKS.



(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: By the last few questions and answers, Mr. Dreyer, do you mean that in some cases the tank tables are prepared in the Los Angeles Basin District?

The Witness: No, sir. The tables are not prepared in the Los Angeles Basin District. The strap-pings are made, of course, where the tank is located, and the data is then sent to Houston for the computations and preparation of the tank tables.

Trial Examiner Scharnikow: All of the tank tables are prepared in Houston?

The Witness: Yes, sir. We might make photostatic copies or something like that.

Mr. Brooks: I will ask the reporter to mark as Respondent's Exhibit 19 for identification a three-page report, photostatic copy thereof, which is entitled, "The Texas Company, Wilson Community Lease, Torrance Field."

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 19 for identification.)

Q. (By Mr. Brooks): What is the Respondent's Exhibit 19 for identification, Mr. Dreyer? [2492]

A. This is a typical tank table as prepared for use on our various tanks, this one being for what we call a 1,500-barrel lease tank.

Q. I note the date on this, Mr. Dreyer, over to the right-hand side up toward the top, "Date Strapped, 8-29-1940." Is the same type of report used now?

A. Yes, sir.

Q. From what is the information contained on Re-

(Testimony of Elmer L. Dreyer.)
spondent's Exhibit No. 19 for identification obtained?

A. Will you read the question?

(The question was read.)

The Witness: The information necessary to compute the tank table is obtained from the tank strap-pings.

Q. (By Mr. Brooks): Who prepares this tank table?

A. The tank tables now are prepared in our Houston office.

Q. Since when have they been prepared there?

A. For the past six or seven years.

Q. Are they then returned to the Los Angeles office at any time?

A. Copies of the tank table are then returned to us at my office in Wilmington.

Q. And what, if anything, do you do with those copies returned?

A. We distribute those copies, at least one copy going to the Los Angeles office, one copy to the field office, producing [2493] department, and in the case of an outside producer, at least one copy to that outside producer. We would retain a copy in our office.

Mr. Brooks: I offer Respondent's Exhibit 19, with the statement that it is not offered for the purpose of showing the information which has been filled into the form, but is merely to indicate the form used.

Mr. Hackler: I have no objection to its being received. The exhibit consists of a three pages, but covers a single tank?

(Testimony of Elmer L. Dreyer.)

Mr. Brooks: It is Tank No. 797, and I put the whole thing here, because on the first page, at the bottom right-hand corner, it says "One of Three," the next one is "Two of Three," and "Three of Three," just to show the whole form. It is all one.

Mr. Hackler: All one tank?

Mr. Brooks: That is right.

Trial Examiner Scharnikow: Respondent's Exhibit No. 19 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 19 for identification was received in evidence.)

Q. (By Mr. Brooks): Mr. Dreyer, you have testified that Respondent's Exhibit 16 indicates the operations and shipments and movements of The Texas pipe line division gathering facilities from September 4th to September 27th. Was there [2494] a change at or about September 27th in the operations?

A. Yes; shortly after September 27th, I think, the operations increased.

Q. Did you, on or about September 27th, receive any information or instructions from higher authority regarding that?

A. I did.

Q. What was it?

A. The instructions I received at that time were to the effect that we should——

Mr. Hackler: May we more particularize this? I haven't objected to vagueness, but it appears now it is going to be quite vague.

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: I would suggest you find out from whom.

Mr. Hackler: From whom and the usual information.

Q. (By Mr. Brooks): You have stated this was on or about September 27th?

A. That is correct.

Q. Will you tell us from whom you received it and what the instructions were?

A. I received instructions from Mr. B. O'Connor, manager of the pipe line division, to prepare to deliver more crude to the refinery, that operations were going to be resumed at the refinery, and that field operations would be stepped up; [2495] that we should be prepared to handle the crude.

Q. Prior to that time, September 27th or thereabouts, did the persons shown on the chart, Respondent's Exhibit No. 14, work regularly on a schedule with the exception of the bottom block in the two left-hand columns? A. They did.

Q. Did the office employees who are shown on the chart and who you have testified were not included in the bargaining unit work regularly during this period of September?

A. They did, with the exception of Sundays, when they were unable to get through the picket line.

Q. Was there any change made in the schedule of these persons who had been working prior to September 27th?

A. Yes, with the exception of Mr. O'Connor, the manager, who went on to a longer workweek.

(Testimony of Elmer L. Dreyer.)

Q. Did you issue instructions for such a change?

A. Yes.

Trial Examiner Scharnikow: When was that?

Q. (By Mr. Brooks): When was that?

A. Those instructions were issued on or about September 27th. They may have extended over several days, getting the instructions to all employees involved.

Q. Whom did you instruct to disseminate this information?

A. In some cases I gave the information direct to the employees. Mr. F. A. Jones, the assistant superintendent, [2496] instructed most of them.

Q. Did this change in schedule apply to all or only a portion of those employees not covered by the agreement?

A. The change in schedule applied to all employees not covered by the agreement.

Q. This change in schedule, then, would apply to everyone on this chart below Mr. O'Connor, with the exception of the two columns headed by the word "Supervise"?

A. With those exceptions, with the exception of the block headed "Relief Oil Dispatcher," because those two men were no longer working as of September 27th.

Mr. Hackler: Read the question and answer.

(The record was read.)

Q. (By Mr. Brooks): The change in schedule applied to persons not indicated on this chart?

(Testimony of Elmer L. Dreyer.)

A. Yes, it applies to the office of the people not indicated on the chart.

Q. Was there any change made at or about September 27th regarding the functions of the persons who were working who were not covered by the agreement? A. Yes. [2497]

Q. What were the instructions regarding those changes and to whom made and by whom?

Mr. Hackler: You mean, on or about September 27th?

Mr. Brooks: Yes.

The Witness: In accordance with instructions that had been given to me by Mr. O'Connor, I issued instructions to Mr. Jones, who in turn prepared the schedule which I approved and together men were instructed in detail to the work for handling further operation duties.

Q. (By Mr. Brooks): Were there any changes made, and if so what, regarding the method of patrol?

Mr. Hackler: May I ask a voir dire question, Mr. Examiner?

Trial Examiner Scharnikow: On this particular question?

Mr. Hackler: On this particular question, yes.

Trial Examiner Scharnikow: Yes, you may.

Voir Dire Examination

Q. (By Mr. Hackler): Mr. Dreyer, were these schedules that you say Jones prepared at your direction and which were approved by you in writing?

A. Yes.

Mr. Brooks: Excuse me. I think it is not under-

(Testimony of Elmer L. Dreyer.)

stood. Do you mean the schedules in writing or were the instructions in writing?

Mr. Hackler: He said he issued instructions to Jones to prepare some schedules for work that he described, and my [2498] question was if those schedules were in writing and he said that they were and were approved by you, Mr. Dreyer?

The Witness: That is correct.

Mr. Brooks: You understood he meant schedules?

The Witness: I understood the actual schedules, not the instructions.

Mr. Hackler: Then I will object to the question as not the best evidence of what change in scheduling of work took place at that time.

Trial Examiner Scharnikow: I think that is so.

Mr. Brooks: That is all right. It is a preliminary question. I will furnish them.

May we take our recess at this time?

Trial Examiner Scharnikow: Will will take a 10-minute recess.

(Short recess taken.)

Mr. Brooks: I request the reporter to mark for identification as Respondent's Exhibit 20, three yellow sheets subdivided as follows:

20-A: "Schedule Supervisors, Week 9-13—9-19."

20-B: "Schedule Supervisors 9-20—9-26."

20-C: "Schedule Supervisors 9-27—10-3."

(Thereupon the documents above-referred to were marked Respondent's Exhibits 20-A, 20-B and 20-C for identification.)

(Testimony of Elmer L. Dreyer.)

Q. (By Mr. Brooks): Mr. Dreyer, I show you what has been [2499] marked for identification as Respondent's Exhibit 20-A, B and C. Do you know who prepared the first page, 20-A?

A. It was prepared by Mr. F. A. Jones.

Q. When?

A. Shortly preceding the 13th of September.

Q. Do you know who prepared 20-B?

A. Mr. F. A. Jones.

Q. When?

A. During the week preceding September the 20th.

Q. Do you know who prepared 20-C?

A. Mr. F. A. Jones.

Q. When?

A. On or about September the 27th.

Q. Did you see Exhibit 20-A on or before September 13th, and if before, how long before?

A. I don't remember exactly. I did see it before September the 13th probably a few days.

Q. Did you see Exhibit 20-B on or before the 20th, and if before, when?

A. I did see it before the 20th of September, probably two or three days before.

Q. What about Exhibit 20-C?

A. I saw that schedule on or about September 27th at the time it was prepared.

Q. Did you approve each and every one of these schedules? [2500]

A. I did.

Q. There is no written indication of your approval on there, is there?

A. No, sir.

(Testimony of Elmer L. Dreyer.)

Q. Do you remember approving them?

A. I approved them orally, because in discussing them there were some minor changes made at my request.

Mr. Brooks: I offer into evidence Respondent's Exhibits 20-A through C.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Respondent's Exhibits 20-A through 20-C are admitted in evidence.

(The documents heretofore marked Respondent's Exhibits 20-A through 20-C for identification were received in evidence.)

SCHEDULE SUPERVISORS - WEEK 9/13- 9/19

	MON. 9/13	TUES 9/14	WED. 9/15	THURS. 9/16	FRI. 9/17	SAT. 9/18	SUN. 9/19
		24 HR. PATROL					
MND - 8 ⁰⁰	CODY	CODY	CODY	HIGHT	HIGHT	CODY	CODY
P - 4 ⁰⁰	ROGERS	ROGERS	ROGERS	ROGERS	HUSD	LETSON	LETSON
B - 12 ⁰⁰	HUSD	HUSD	REDDING	REDDING	REDDING	REDDING	REDDING
		LOS ALAMITOS TANK FARM					
Q - 4 ⁰⁰	HARDIN	HARDIN	HUSD	HUSD	HARDIN	HARDIN	HARDIN
		OFFICE					
	MUNSELL LETSON	MUNSELL HIGHT	MUNSELL HIGHT	MUNSELL LETSON	LETSON	—	—

NATIONAL LABOR RELATIONS BOARD

CASE NO. 24-1A-216 ^{RESPONDENT} EXHIBIT NO. 20-AIN THE MATTER OF Texas Co.DATE 11/18/44 V. WITNESSES Dreyer

ETHEL E. HENDERSON, OFFICIAL REPORTER

BY Gen. Reporting Co.Days off for labor dayHardin - 9/6
Munsell - 9/17Hight - 9/13
Rogers - 9/17

Per p 20

PHI

AL

SCHULKE - SUPERVISORS '20-9/26

	MON 9/20	TUES 9/21	WED 9/22	THURS 9/23	FRI 9/24	SAT. 9/25	SUN 9/26
		24 HR. PATROL					
2 ⁰⁰ - 8 ⁰⁰ A	HUSO	HUSO	REDDING	REDDING	REDDING	HUSO	HUSO
8 ⁰⁰ - 4 ⁰⁰ P	CODY	CODY	CODY	CODY	HUSO	ROGERS	ROGERS
4 ⁰⁰ - 12 ⁰⁰ MID	REDDING	ROGERS	ROGERS	ROGERS	CODY	REDDING	REDDING
		LOS ALAMITOS TANK FARM					
0 ⁰⁰ - 4 ⁰⁰ P	HARDIN	HARDIN	HUSO	HARDIN	HARDIN	HARDIN	HARDIN
		OFFICE					
Mumrell Hight Letcher	Mumrell Hight Letcher	Mumrell Hight Letcher	Mumrell Hight Letcher	Mumrell Hight Letcher	Mumrell Hight Letcher	— — —	— — —

NATIONAL LABOR RELATIONS BOARD

CASE NO. CA-45 EXHIBIT NO. 20-B
IN THE MATTER OF Texas Co.
DATE 11/18/48 WITNESSES Stacy
ETHEL F. FISHER, OFFICIAL REPORTER
BY Don Reporting Co.

Days off for 9/6

Hardin - 9/6
Cody - Vac.
Mumrell - 9/17
Hight - 9/13
Rogers - 9/17
Huso - ok
Redding - ok
R.P. 20

SCHEDULE SUMMARY 20 7/27-10/3

	MON 9/27	TUE 9/28	WED 9/29	THU 9/30	FRI 10/1	SAT 10/2	SUN 10/3
	24HR FEEDING						
- 7 ⁰⁰ _L	HIGHT	HUSO	HUSO	HUSO	HUSO	HUSO	HUSO
- 7 ⁰⁰ _P	ROGERS	ROGERS	ROGERS	ROGERS	HIGHT	ROGERS	ROGERS
- MID	HUSO	HUSO	HUSO	HUSO	HUSO	HUSO	HUSO
	LOS ALGAMITOS						
7 ⁰⁰ _P	HARDIN FEEDING	HARDIN FEEDING	HARDIN FEEDING	HARDIN FEEDING	HARDIN FEEDING	HIGHT REDDING	HARDIN REDDING
	MUNSELL						
7 ⁰⁰ _P	MUNSELL	MUNSELL	MUNSELL	MUNSELL	MUNSELL	MUNSELL	MUNSELL
	LETSON						
	LETSON						

INDEPENDENT'S EXHIBIT No. 20-C

HIGHT	7	12	12	12	12	12	5	= 72
ROGERS	12	12	12		12	12	12	= 72
HUSO	5	12	12	12	12	12	7	= 72
COPY	-	12	5	12	12	12	12	= 65
HARDIN	12	12	12	12	12	-	12	= 72
LETSON	12	12		12	12	12	12	= 72

P.P.C.
20

(Testimony of Elmer L. Dreyer.)

Mr. Brooks: I ask leave to withdraw the exhibits for photostating purposes.

Trial Examiner Scharnikow: No objection, Mr. Hackler?

Mr. Hackler: None.

Mr. Brooks: And with leave to substitute a photostat.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Permission is granted.

Q. (By Mr. Brooks): Referring to Respondent's Exhibit 20-A, Mr. Dreyer, I note no oil dispatchers' names on there. Is that correct?

A. That is correct. [2501]

Q. Referring to 20-B, I note no oil dispatchers' names on there. Is that correct?

A. That is correct.

Q. Is the same true of 20-C? A. Yes.

Q. Were the oil dispatchers working during the week 9-13 to 9-19? A. They were.

Q. Do you have any explanation as to why they are not on that schedule?

A. During that week they were working on their regular schedule. These are special schedules that were prepared to fit a special case, special instance.

Q. Were schedules of the supervisory force whose names appear on Respondent's Exhibit 20-A, with the exception of Cody, prepared for weeks previous to 9-13 to 9-19?

A. They were prepared for the week preceding September the 13th, but such schedules were generally not prepared for the time preceding the strike.

(Testimony of Elmer L. Dreyer.)

Q. It is in the record that Mr. Cody was not working the week preceding the 13th. Is that your recollection? A. That is correct.

Q. The same kind of schedule was prepared for the week preceding 9-13, is that right?

A. That is right. [2502]

Q. Did you at any time during the strike prepare schedules for the oil dispatchers?

A. Such schedules were prepared and I approved them.

Q. When was that first done?

A. To the best of my recollection, that was first done for the week starting September the 17th.

Q. Was that in connection with this decision to operate on a 12-hour day?

A. That is correct.

Mr. Brooks: Will the reporter mark for identification as Respondent's Exhibit No. 21 a one-page tabulation entitled "Dispatchers Schedule."

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 21 for identification.)

Q. (By Mr. Brooks): I show you Respondent's Exhibit 21 for identification, Mr. Dreyer. What is that?

A. That is a schedule for the dispatchers for the week October 4th to the 10th, inclusive, 1948.

Q. Who prepared that?

A. That schedule was prepared by Mr. J. J. Evans, chief dispatcher.

Q. Did you approve it? A. I did.

(Testimony of Elmer L. Dreyer.)

Q. When?

A. A few days before the 4th. [2503]

Q. Was a schedule similar to that prepared for the preceding week?

A. I am not sure. I think there was.

Q. Have you during the recess searched to see if you could find one in your brief case that you have with you?

A. I did.

Q. Did you find one?

A. No.

Mr. Brooks: Mr. Examiner, we will endeavor to locate the one that was made, if one was made. It is the understanding or impression now from Mr. Jones, I am told, that such was. If we find it, we will produce it.

I offer into evidence Respondent's Exhibit 21.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit 21 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit 21 for identification was received in evidence.)

Mr. Brooks: I request leave to withdraw this and to make photostatic copies and to substitute a photostatic copy.

Mr. Hackler: No objection.

Trial Examiner Scharnikow: Permission is granted.

Q. (By Mr. Brooks): Mr. Dreyer, during the period of the strike period did the individuals shown on Respondent's Exhibit 20-A, B and C keep any

(Testimony of Elmer L. Dreyer.)

records or make regular entries in [2504] connection with their work?

A. Most of them did, not all for all shifts that they worked.

Q. What method did you use for those entries?

A. The entries were made in a notebook, small black pocket-size notebook.

Q. Where did they make those entries? What I mean is, did they come into the office and make them, did they keep them *or* their persons, or how did they take care of that?

A. A notebook was kept by the man while he was on duty, and entries were made in it from time to time during the period he was working.

Q. Was one or more notebooks used?

A. Through part of the period two notebooks were used.

Q. Explain how they were used and why you had two?

A. One notebook was in the possession of the man that was on duty working. He was making his notes. The other notebook was in the office where Mr. Jones and myself could examine it from time to time but on no regular schedules. The books alternated, thus the notes are not in any consecutive order in the two books.

Q. Did you examine those books regularly during the period of the strike?

A. I examined them from time to time, but at no regular intervals.

(Testimony of Elmer L. Dreyer.)

Q. Did you as a practice make any mark to indicate you had [2505] seen it?

A. I did not myself, no.

Mr. Brooks: I will request the reporter to mark as Respondent's Exhibit 22 a book written in red on the inside of the cover "Book No. 1."

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 22 for identification.)

Q. (By Mr. Brooks): Mr. Dreyer, I show you a book marked for identification as Respondent's Exhibit No. 22. What is that book?

A. That is one of the two notebooks that I referred to in an answer to a previous question.

Q. Were those entries in this book read by you from time to time, as you said, not on a regular schedule, but read by you from time to time during the strike?

A. They were.

Q. Do you know that Mr. Cody made entries into this book?

A. I do.

Q. Do you know his signature?

A. I do.

Q. I show you a page in this Respondent's Exhibit 22 for identification which is headed, "9-14-48." Do you know whether that is George Cody's signature?

Mr. Hackler: Just one moment, please, Mr. Examiner. May I inquire the purpose of this? [2506]

Mr. Brooks: The document?

Mr. Hackler: The purpose of calling the witness' attention to apparently what is some notation in a

(Testimony of Elmer L. Dreyer.)

book identified but not offered. Apparently, as I say, it is some notation or fact or fiction or something above Cody's signature.

Trial Examiner Scharnikow: Well, I haven't seen it.

Mr. Hackler: I haven't seen it either, but before the witness is interrogated concerning it——

Trial Examiner Scharnikow: Do you want to inspect the entry?

Mr. Hackler: Not only do I want to inspect it, but I would like to know what the purpose of the offer is.

Trial Examiner Scharnikow: It may be apparent to you when you read it, I don't know.

Mr. Brooks: Maybe we could clear it up this way: Maybe no further foundation questions will be needed. Maybe counsel has no objection to this being received in evidence.

Mr. Hackler: You mean, the whole book?

Mr. Brooks: Yes.

Mr. Hackler: I haven't had a chance to read it. Let me read this item here you are asking him about.

Mr. Brooks: Let me further clarify the purpose I have in mind. I offer this for the purpose of indicating that Cody knew at various times during the strike while he was working that certain operations were going on, pumping operations, wells [2507] running and the like. It is in connection with the position taken by the General Counsel that no work was done until about the 28th of September. Further, the position of General Counsel that an agreement

(Testimony of Elmer L. Dreyer.)

was made that no work would be done. This book is offered for that purpose and any entries prior to the day Mr. Cody came to work, of course, are not material and are not offered. Further, I will state with respect to the contents of it, I have had prepared a typewritten copy of the contents of this book, which I will be glad to furnish to counsel.

Mr. Hackler: I take it, the typewritten portions include that which you deem relevant?

Mr. Brooks: It includes the entire book, even that portion which is not deemed relevant. I am only offering that portion beginning from September 13th through the last day that Mr. Cody worked.

Trial Examiner Scharnikow: Cody testified that he made reports on two occasions to the dispatcher.

Mr. Brooks: Orally telephonic reports.

Trial Examiner Scharnikow: Evidence of passage of oil.

Mr. Brooks: He indicated he kept a book.

Trial Examiner Scharnikow: He indicated he kept a book, yes. [2508]

Mr. Hackler: The page you invite the witness' attention to, if I correctly read it, is simply a log of where Cody went that day and what he did. There is no report of any kind other than he went at various times to various operations, that he called in, and checked various places, had a flat tire and fixed it, got some gasoline.

Mr. Brooks: That is true for that day. There are other days that follow which bear out the position that we are taking.

(Testimony of Elmer L. Dreyer.)

Mr. Hackler: I have no question, of course, as to the authenticity of the notations, that is, that Cody made them and that it is his signature on them. I have no question this is the book that Cody referred to as a log, I think he called it in his testimony here.

Might I suggest, Mr. Examiner, in view of the fact that there are a number of items that counsel presumably wants to invite attention to, that if there is made available to me the typewritten copy, we might go through it and save time.

Trial Examiner Scharnikow: Have you in mind any specific portions of this book?

Mr. Brooks: Yes.

Trial Examiner Scharnikow: That you want to rely on?

Mr. Brooks: Oh, yes. I can refer to those right now.

Trial Examiner Scharnikow: Well, suppose for the purpose of identification you give a number to your typewritten [2509] copy and then possibly on that basis indicate for the record what portions you rely upon, and maybe we can handle it more easily that way.

Mr. Brooks: Suppose I at this time indicate the pages in the book, and we will mark on the book the identifying symbol that I will indicate as we go along.

Mr. Hackler: Perhaps we can simplify it. You are satisfied with the accuracy of the typewritten copy? If you are, it might be easier to indicate the

(Testimony of Elmer L. Dreyer.)

portions on the typewritten copy, and at this time let the typewritten copy be substituted for the original.

Mr. Brooks: Let me ask the witness a question or two about the typewritten copy.

Trial Examiner Scharnikow: Suppose you do that.

Q. (By Mr. Brooks): Mr. Dreyer, you have furnished me with several copies of a typewritten reproduction of book number 1. Is that correct?

A. That is correct.

Q. Is this the typewritten reproduction you have furnished me? A. It is.

Q. Who prepared this, or under whose direction?

A. This was prepared at my office under my direction.

Q. Did you personally proofread this typewritten copy against the book? [2510] A. I did.

Q. What variations are there, if any?

A. In the book there are many abbreviations which would not be readily identified by one who is not familiar with our phraseology, such as the initials "Y.L." standing just for Yorba Linda. Sometimes just the initial "L." indicating the word "Laboratory," and such as "S.F.S.L." which we know to mean Santa Fe Springs Laboratory. In the typewritten copy we have spelled out those abbreviations.

Also, the notes were in many cases without any punctuation whatsoever. In other cases punctuation was very meager. The typewritten copy is punctuated. Where the notes were signed by the man en-

(Testimony of Elmer L. Dreyer.)

tering them, the typewritten copy is indicated by the word "Signed" in parentheses, followed by the typewritten name. In those instances where the notes were not signed, but we were able to very surely identify the person who had made the notes, either by his handwriting or by the sequence in which the notes were in the book, we have indicated the word "Identified" in parentheses, followed by the name of the man that we know entered the notes.

Trial Examiner Scharnikow: Was that done in any case with reference to an entry made by Mr. Cody?

The Witness: I think in every case Mr. Cody signed the notes.

Mr. Hackler: On page 14 I find one such instance, to [2511] help the witness here. On page 14, an item of September 18th, which appears on the typewritten list at page 14, beginning, "Relieved Redding at headquarters. Called the dispatcher," and so forth.

The Witness: That is an entry which was made which we identified by Cody's handwriting, plus the fact that the man that relieved Cody wrote in the book, "Relieved Cody at 8:00 a.m."

Mr. Brooks: You will notice the next entry.

Trial Examiner Scharnikow: My suggestion is that you give this typewritten copy another exhibit number and then determine eventually which of the two you want admitted, or if you want both admitted, of course, you may offer to do that.

Mr. Hackler: Perhaps, with reference to Mr.

(Testimony of Elmer L. Dreyer.)

Cody, Mr. Cody is here, and we can clear it up and identify his handwriting and make a full and complete substitution. I presume you want this original document back eventually?

Trial Examiner Scharnikow: I think they should have separate exhibit numbers, because some question may come up later in the hearing as to what the original said, for the purposes of comparison.

Mr. Brooks: What I would like to do is indicate the pages in the book which we believe are material.

Trial Examiner Scharnikow: Does the copy have indication of the book paging of the substance?

Mr. Brooks: The book pages are not numbered. They are dated only.

Mr. Hackler: However, there is a typewritten one that presumably is consecutive, the same as the book to which it refers.

Mr. Brooks: That is correct.

Mr. Hackler: For example, I am looking at September 18th on the typewritten copy, page 14 of the typewritten copy, which presumably we could find by going to that date as it appears chronologically in book number 1.

Mr. Brooks: That is correct.

Mr. Hackler: May I suggest that, as you said, the typewritten copies be identified, and in offering or using them in the course of the hearing, that any offering or using be subject to comparison with the original if a question is raised?

Trial Examiner Scharnikow: I think that should be done.

(Testimony of Elmer L. Dreyer.)

Mr. Brooks: Will the reporter mark as Respondent's Exhibit No. 23 for identification 38 typewritten pages entitled "Book No. 1."

(Thereupon the document above referred to was marked Respondent's Exhibit No. 23 for identification.)

Mr. Brooks: Mr. Examiner, I think it would be appropriate maybe to work it this way: I will indicate now on the typewritten copy, which is marked as Respondent's Exhibit No. 23 [2513] for identification, the portions which we wish to offer and consider material. We will keep available the book itself for purposes of check by Mr. Hackler, Mr. Cody, or anyone else. I would like to indicate the portions that we consider material, because it goes beyond the entries made by Mr. Cody himself, because the testimony is that Mr. Cody had the book, thus he would have available for reading entries made during the same period of time by other people. So if I might at this time indicate the portions and we will refer by page number to Respondent's Exhibit No. 23 for identification, a copy of which counsel now has, and if it is agreeable, I will furnish at this time a copy for the Trial Examiner.

Trial Examiner Scharnikow: You are offering portions of Respondent's Exhibit No. 23?

Mr. Brooks: Yes. At page 3, the entry of J. R. Letson, as identified, not signed.

Trial Examiner Scharnikow: That is the entire entry for September 5th?

(Testimony of Elmer L. Dreyer.)

Mr. Brooks: Yes, I have reference to the latter portion of it.

Mr. Hackler: That is the September 5th entry above Letson's identified signature?

Mr. Brooks: Correct.

Mr. Hackler: And with reference to that portion, it is what? [2514]

Mr. Brooks: "Drove to Signal Hill via headquarters. Inspected Laboratory and station; all O.K. Gauged and took temperature of Tank 5532."

Mr. Hackler: Do you want to discuss these as we go along with reference to your offer of them, of the separate items?

Trial Examiner Scharnikow: Suppose we get them all identified and then we can talk about them piecemeal, if you want.

Mr. Brooks: The next one is page 5, September 6th, signed "Rogers." Near the middle portion of the page, the September 6th entry, over Rogers' signature, "Yarnell wells still pumping. Richfield-Consolidated and Krug wells still pumping."

Further on page 5, the September 6th entry, particularly the sixth line from the bottom, "Krug and Yarnell wells still pumping."

Page 8, the September 9th entry, particularly near the middle of the last half of that page: "Krug Lease shipping pump running." Then the two succeeding lines after that one.

Page 9, at the top of the page, which is a continuation of the same September 9th entry, the portion beginning with "Removed seals from Royalty

(Testimony of Elmer L. Dreyer.)

Service Company tanks for Standard Oil." That is the first line at the top of page 9.

The next sentence: "Closed 6-inch gate on Royalty Service line." [2515]

Page 11, the September 14th entry of George Cody, there is no indication there of the kind of work I have been referring to being performed, but it is in order to indicate George Cody had possession of the book on that day.

Mr. Hackler: What is the item there?

Mr. Brooks: No particular item. Still on page 11.

Mr. Hackler: In connection with that may I inquire, is there some other item on that day that, by his possession of the book, he is deemed to have notice of?

Mr. Brooks: The purpose is to show that he had notice of all which had gone on previous to that, because all entries had been made in the book.

Trial Examiner Scharnikow: There is no statement in the entry of September 14th by Cody that you are calling attention to?

Mr. Brooks: That is correct. However, on the same page 11 of the typewritten copy, Exhibit 23, there is toward the bottom in the September 14th entry of Rogers, "Delivered run tickets to producing department."

The entry in the last third of page 12 of George Cody with no specific reference.

Mr. Hackler: Is that to impute to him knowledge of something before or that he merely did the things recited in the entry?

(Testimony of Elmer L. Dreyer.)

Mr. Brooks: To impute knowledge that just what had been [2516] entered previously had gone on.

Page 13, the entry of September 15th in the top half of the page, particularly reference is after 10:45 a.m.: "Wells all pumping. Krug pump pumping."

Page 14, the entry of George Cody under date of September 18th, particular reference near the middle of the entry, "All the leases in Santa Fe Springs are pumping again." [2517]

Also after that sentence appears this, with two intervening entries: "All of these leases are running," referring to Montebello.

Further down two lines appears, "Harlow-Kent, Bauman and Campbell leases are running again."

Entry on page 15 of George Cody under date of September 19th, near the end of the entry, "O'Neil wells pumping."

The entry on page 17 of George Cody for September 20th, no particular reference; the entry for September 21st of George Cody on page 17—

Mr. Hackler: You offered the September 20th of Cody's?

Mr. Brooks: Yes.

Trial Examiner Scharnikow: Only on the signature again?

Mr. Brooks: And the matter that he indicated that he had the book.

The references on September 21st, about the middle of the second paragraph, reading, "Tank 4298, Columbia Lease—no numbered seal. Suction

(Testimony of Elmer L. Dreyer.)

closed. Called dispatcher at 1:30 p.m. Stopped and talked to Letson by Elliot lease; as we were talking someone came up and gauged Elliot tank. I asked if he knew who it was and he said 'A SoCal man, I guess.' Left for Yorba Linda. Krug pump running. Station O.K. Tank 2013 open to receive."

Page 18, the entry of September 22, 1948, opposite the time entry 0140 and 0200, "Talked with pumper who says that [2518] several wells were shut down yesterday."

Mr. Hackler: That is an entry of Mr. Redding, I take it?

Mr. Brooks: That is right.

Off the record a minute, Mr. Examiner.

Trial Examiner Scharnikow: Off the record.

(Discussion off the record.)

Mr. Brooks: Page 19, the entry of George Cody, dated September 22, 1948, no particular reference.

Page 19, the entry of George Cody, as identified, not signed, September 23rd, a reference about the middle of the paragraph: "Three leases running."

Page 20, the third line from the top, which is a part of the entry of September 23rd, which begins on page 19. The reference is: "6:30 p.m., Los Alamitos No. 1. Started and ran motors in trucks and cleaned out desk."

I further offer the entry of September 24th, beginning near the bottom of page 21 and ending near the middle of page 22, signed by George Cody, with no particular reference.

I do not offer any entries made after that.

(Testimony of Elmer L. Dreyer.)

Mr. Hackler: After——

Mr. Brooks: After the entry of George Cody on September 24th. This particular book was not in his possession at any time after that.

Mr. Hackler: Can we go through the other book?

Mr. Brooks: Yes, I will do that right now.

I request the reporter to mark the document entitled "Book No. 2," containing 19 typewritten pages as No. 24.

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 24 for identification.)

Trial Examiner Scharnikow: Do you have the original of that book, too?

Mr. Brooks: Yes, I do. Would you like to have that marked for reference?

Trial Examiner Scharnikow: Yes, I think so.

Mr. Brooks: Very well. Mark the typewritten copy as Respondent's Exhibit No. 24 for identification and a black notebook as Respondent's Exhibit No. 25.

(Thereupon the document above-referred to was marked Respondent's Exhibit No. 25 for identification.)

Q. (By Mr. Brooks): I show you Respondent's Exhibit No. 24 for identification and 25 for identification, and ask you to explain to us what those two exhibits are.

A. The Exhibit No. 25 is one of the two black

(Testimony of Elmer L. Dreyer.)

notebooks referred to as being used during the strike period in answer to one of your previous questions.

Exhibit No. 24 is a typewritten copy of this Notebook No. 2, which was prepared in the same manner as was the typewritten copy in the case of Book No. 1.

Q. Do the same variations occur in the typewritten copy of [2520] Book No. 2, which is 25, as occurred in the typewritten copy of Book No. 1?

A. They do.

Mr. Brooks: Would you like to dispose of Respondent's Exhibit No. 24 at the present time, Mr. Examiner?

Trial Examiner Scharnikow: Suppose you specify the portions of No. 24 which you offer, and then we will consider an offer of 23 and 24 at one and the same time.

Mr. Brooks: Referring to the typewritten copy which is marked as Respondent's Exhibit No. 24, I offer, referring to page 1, the September 8th entry, particularly referring to the paragraph headed "5:10" to "6:00 o'clock p.m.," the last sentence: "Found Texas Company wells pumping."

Mr. Hackler: Inasmuch as that is Hight's entry, I take it that is to impute knowledge to Cody of that entry?

Mr. Brooks: That is correct, the same applies to the 8:00 o'clock p.m. entry: "Yarnell wells pumping."

For the same purpose I offer the last statement

(Testimony of Elmer L. Dreyer.)

on page 1, under the September 9th entry: "Pearce No. 1 pumping. Tank O.K."

I offer the entry of September 11th on page 4, signed by Redding, opposite the time 0600, "Pearce No. 1 still pumping."

I offer the entry of September 12th on page 5, at the bottom of the page, particularly referring to the last sentence [2521] in the 9:00 a.m. entry: "Pearce, Elliot, Barker, Brown, Towers and Smythe wells still pumping."

Further, with reference to the last two sentences of the 11:00 a.m. entry, beginning with "Bradford" and ending with that page.

I offer the entry of September 13th, beginning at the last third of page 6, signed by George Cody. There is no particular reference to that entry, the contents of that entry.

Mr. Hackler: I take it that is——

Mr. Brooks: To indicate that George Cody had the book in his possession at that time, and that the previous entries already referred to were in the book at that time.

I offer also on the September 15th entry, in that entry on page 7, after the time 0615, "Pearce still pumping."

I offer on page 9 the entry opposite 2:30 p.m., the portion stating, "Most wells pumping," which is under the September 16 entry continued from the preceding page, and signed by Rogers.

I offer on page 10 the entry of September 17th by Hight, referring to the last sentence after the

(Testimony of Elmer L. Dreyer.)

1:30 a.m. entry, "Wells operating on Volmer-Meyers, Smythe, Towers, and Brown leases."

Further, referring to the second sentence opposite the 2:45 a.m. entry, "Wells operating on Richfield-Consolidated, Krug, Yarnell. Tank 10008 is nearly full (oil within three [2522] foot of top). 2009 about half full and open to field. 2008 empty."

I offer on the same page in the September 20th entry, about the middle of the first paragraph, "Tanks 1174 and 1175, Matern No. 3 lease, suction gates closed but no numbered seals." That is in the September 20th entry, same page.

"Also Tank 1146, Matern No. 2 and 1166 Baldwin. Pumps, discharge and suction both closed."

Next to the last paragraph of the same entry, the same page, in the second line of that paragraph, "Yarnell pump running. Seals broke on Tanks 1217 and 1228. Suction gate open on 1217. Close on Tank 1228. Stream going into Tank 10006."

I offer beginning with the last line on page 10 in the same entry, all of that last line and continuing on page 11, "open on Tank 1223."

I refer to the next paragraph on page 11 in the same entry, the entire paragraph. That is signed by George Cody.

Trial Examiner Scharnikow: This is in the 20th entry—no, it must be—yes, in the September 20th and ending at the top of page 11.

Mr. Brooks: September 20th entry which entry begins below the first half of page 10 and carries through almost half of page 11. That is all one en-

(Testimony of Elmer L. Dreyer.)

try. It will be noted at the top of page 11 it is, "September 20, 1948 (Cont'd)." [2523]

I offer the entry on page 11 after the September 20th entry opposite the time 0630, "Pearce No. 1 pumping."

I offer the entry beginning at the bottom of page 12 dated September 21st, which continues to page 13 and signed by George Cody.

Mr. Hackler: The whole day?

Mr. Brooks: I offer the entire entry for the purpose previously stated of indicating that George Cody had the book on that day and had knowledge of the entries in the book made previously, and also call attention to the statement, "Found leak on Voix lease in Santa Fe Springs," and what he did about it.

Mr. Hackler: Is that this——

Mr. Brooks: Top of page 13, which is a continuation of the September 21st entry of George Cody.

I offer the entry of September 22nd, signed by George Cody, appearing on Page 13, in its entirety for all the reasons previously stated, and I make particular reference to the following, beginning about the middle of the paragraph, "Seal broken on tank 4300." Another statement following that shortly, "Wells running."

Another statement on the next line, "Most of wells are shut down," referring to Yorba Linda.

Dropping down three lines the statement, "New Bradford well still running. Talked to Hopkins, and he said they would run them until tanks were full."

Dropping down two lines, the statement, "Some

(Testimony of Elmer L. Dreyer.)

wells are running in Montebello." There is one further reference two lines above the last referred to statement that I would like to call attention to, and that is, "2013 open to field."

I offer the entry of September 23rd, Page 14, signed by Redding, with particular reference to that portion after the time 0550, "Pearce No. 1 pumping."

I offer the entry of George Cody at Page 15, which begins at the top and ends with "Signed, George Cody," with no particular reference and for the purposes previously stated.

I offer nothing in the documents beyond that entry of George Cody dated September 23rd. The book was not in his possession after that time.

Trial Examiner Scharnikow: I have your offer, then—— [2525]

Mr. Brooks: I offer both Respondent's Exhibits——

Trial Examiner Scharnikow: ——23 and 24.

Mr. Brooks: Is that the typewritten copies? I want to offer the typewritten copies, with the understanding that the books will be available at any time during the trial for checking purposes.

Trial Examiner Scharnikow: They are identified and they should be available, of course.

Mr. Brooks: That is right.

Mr. Hackler: Are the documents offered in their entirety or the indicated portions?

Mr. Brooks: I will only offer the portions which I have indicated to this extent: I do not offer any portion after the reference I made on each one, end-

(Testimony of Elmer L. Dreyer.)

ing with the last entry of George Cody. I am offering the documents for the limited purpose of indicating that George Cody had knowledge of certain operations that are indicated as going on in the field, as of the dates up until the time he left. Now, when I limit the marked portions or the referred to portions, that is the material part, but it may be that some sentence preceding or some sentence following would be explanatory.

Trial Examiner Scharnikow: Necessary context.

Mr. Brooks: Right.

Trial Examiner Scharnikow: May I ask you a question, Mr. Hackler? [2526]

Mr. Hackler: Yes.

Trial Examiner Scharnikow: Have you any objections to the entries signed by Cody, or identified as having been written by Cody, where they are having specific references to the subject matter of Cody's writing?

Mr. Hackler: Do I understand that all of these are offered as knowledge of operations on the part of Cody? I so understood the offer.

Mr. Brooks: That is correct, and that operations were proceeding and that he knew about it.

Mr. Hackler: There is no question in my mind or in anybody's that Cody had knowledge of the matters that he entered in the book. My objection goes to the fact that it is not impeaching of Cody in any respect. He so testified here. He had knowledge and made entries in the book. Now, other than this being the best evidence of the entries he made

(Testimony of Elmer L. Dreyer.)

in connection with his testimony, if this is offered as impeaching, for the purpose of impeaching Cody, then I will object to it.

Trial Examiner Scharnikow: Well, I have no difficulty so far as Cody's entries were substances referred to in Cody's testimony, as to the admissibility of the exhibits.

Mr. Hackler: I had this in mind, Mr. Examiner, something that is received for impeaching purposes is limited in its use by the Trial Examiner and the Board so far as findings under the rules of evidence, so that purpose, namely, the [2527] truth or falsity of the testimony of the witness sought to be impeached, and may not be the basis of affirmative findings.

Mr. Brooks: It is not offered for the limited purpose——

Trial Examiner Scharnikow: Well, of course, Cody testified there were only two occasions where he had evidence of flow, as I remember it.

Mr. Brooks: That is my recollection.

Trial Examiner Scharnikow: I may be wrong on it, but that is my recollection of it, and that he made reports in both cases; one case to the dispatcher alone and one case, I think, to Letson.

Mr. Hackler: Mr. Examiner, that is the difficulty of the exhibit, even as to the Cody entries. The great majority of the entries by Cody refer to wells pumping, a producing operation, as this witness explained. For example, a number of those——

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: It may have been going into storage.

Mr. Hackler: May have been? It was. All that was that the man rode by and saw a rocking beam and reported it, so that I certainly don't want—let me object in this fashion: I object to the reception of any of the matters not signed Cody for obvious reasons, so-called imputed knowledge of those items is too speculative and remote to be of any [2528] value here, and for the further reason it has no bearing, no reasonable relationship to Cody's testimony.

With respect to the items that bear Cody's signature, in so far as those items refer to wells pumping, matters that are not pipe line operations, the number of them on their face indicate they are not pipe line operations, such as the ones: "Wells pumping," and I have other notes here.

I object to it being received as not relevant to any issue in the case, as not bearing on anything Cody testified to and having no probative value, the fact that Cody observed wells producing and so reported to management. He at no place testified that the production operations were at a standstill or that he only on two occasions observed some production going on.

With respect to the items that Cody reported himself, they were pipe line operations. Do I understand they are offered as affirmative evidence and not merely as impeaching testimony?

Mr. Brooks: Let me state——

(Testimony of Elmer L. Dreyer.)

Mr. Hackler: Then I will state whether I object or not.

Mr. Brooks: It has been contended and was done so in connection with the Cody case and the entire case that an agreement was made at the beginning of the strike that the company wouldn't do any operations, and that finally, about the end of September, the union revoked its passes because [2529] the company had violated its agreement. Cody testified that he continued to operate and work and draw his money because there were no operations going on, and he wouldn't participate, wasn't participating in any operations. [2530]

Counsel argued that as of the end of September the company changed its policy. That word was used, "policy." That the company decided that it would start operations and it requested Mr. Cody to do something that it had agreed it would not request Cody to do, and that he was therefore relieved of his responsibilities as a supervisory employee, and thus, any refusal to re-employ him was discriminatory within the meaning of the Act.

This shows what was going on and what Cody knew about it insofar as these books indicate.

That is the purpose of offering the information contained in these books.

Trial Examiner Scharnikow: Well, I think I have got enough now.

Mr. Hackler: Of course, I think the record speaks for itself as to our contentions and also as to Mr. Cody's testimony.

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: I have gotten your position on this. I am not going to take Respondent's Exhibits 23 and 24 as probative of the substance of any of the statements. I am going to receive in evidence Respondent's Exhibits 23 and 24, all of the indicated references as well as those cases in which the respondent simply pointed out either Cody's signature or identification of an item as having been entered by Cody, as bearing on, first, the knowledge or [2531] possible knowledge of Cody as to production operations, and also as to flow in the pipe line system, and also with reference to the credibility of Cody's testimony as to that knowledge, when he was on the stand.

I take it that so far as the items not signed by nor identified as having been made by Cody are concerned, that the exhibits, upon consideration of all of the items and the testimony of the present witness Dreyer, indicate the possession of the book, either of the books in question, on the dates when the exhibits indicate that Cody made entries, leaving open the question of any possible ultimate inference from the fact of possession as to knowledge by Cody of the other entries not made by him.

That is my ruling.

Mr. Hackler: So far as the entries made by other people besides Cody, the ruling was they were or were not received?

Trial Examiner Scharnikow: They are received. I am receiving all of the identified portions of the two exhibits for the purposes that I have outlined.

(Testimony of Elmer L. Dreyer.)

Mr. Hackler: Including the items made before Cody returned to work?

Trial Examiner Scharnikow: I am not drawing any inference from the fact of demonstrated possession, that Cody had actual knowledge of entries other than those made by him. I am taking it as showing that he had possession, leaving open [2532] to ultimate decision any possible inference as to whether on the basis of that possession he had knowledge.

Mr. Hackler: I take it that the same applies with reference to all of the items received by you, that you are leaving open the inferences to be drawn from all of the entries in the respect which I mentioned as to what is meant by pumping going on or a well operating, or words to that effect.

Trial Examiner Scharnikow: That's right.

Mr. Hackler: Which of course will have to be elucidated by other evidence, presumably.

Trial Examiner Scharnikow: That is right. Of course there are entries in these exhibits which have been referred to and which I am specifically receiving, which indicate that tanks were either full or nearly full.

Now, the record is still open to explanation as to whether or not there were these storage tanks, if I am using the term correctly, or some tanks within the jurisdiction of the pipe line department.

I am also leaving open the question of whether or not Cody, as a pipe line man, what he should have assumed, or what he might have reasonably assumed, the fact that the wells were operating over the

(Testimony of Elmer L. Dreyer.)

period, about which he may be found to have knowledge as to what that meant in connection with the usual pipe line operations in taking the oil from the leases. I don't know. I don't know now. [2533]

Mr. Hackler: That leaves one class of identified items yet undisposed of, it seems to me. Those are items of the type of the one on page 3, for example, of J. R. Letson.

Trial Examiner Scharnikow: Which exhibit?

Mr. Hackler: Of Respondent's Exhibit 23, and if I am not in error, there were at least a few others of the same type, namely, entries by other people than Cody in which they stated that they performed certain work themselves. The one I have in mind right now is the one of Letson of September 5th, in which he says, "I gauged and took the temperatures of," a certain tank. I don't see conceivably how the fact that some of these fellows were willing to do what Cody later refused to do does, under the circumstances mentioned in evidence, have any bearing on Cody's case if everyone went out and did production work before Cody got back from his vacation, or even after he did.

Trial Examiner Scharnikow: I don't intend to go that deeply into the use of the exhibit.

Mr. Hackler: That was the only portion of that day offered. Two weeks before Cody got back from his vacation his boss, Letson, saw fit to gauge and take the temperatures of the tank.

Trial Examiner Scharnikow: So far as that entry on page 3 by Letson, on Respondent's Exhibit

(Testimony of Elmer L. Dreyer.)

23, is concerned, the clear materiality of the admission of that statement is in [2534] connection with the knowledge of Cody, as to the possible knowledge of Cody as to the substance of that statement, and then the secondary question, assuming that he did know about that statement in the book, what the significance of that statement was to him. I am not going to try to go into that sort of thing.

Mr. Hackler: But those sorts of statements are received, the fact that from time to time the entries would seem to indicate that others than Cody performed work of gauging and taking temperatures?

Trial Examiner Scharnikow: They are received.

Mr. Hackler: For whatever it is worth.

Trial Examiner Scharnikow: That is right.

(The documents heretofore marked Respondent's Exhibits Nos. 23 and 24 for identification were received in evidence.) [2535]

RESPONDENT'S EXHIBIT No. 23

* * * * *

September 5, 1948

Drove to Signal Hill via Headquarters. Inspected Laboratory and station; all O.K. Gauged and took temperature of Tank 5532. (One picket).

(Identified) J. R. Letson

* * * * *

September 6, 1948

Arrived Yorba Linda 11:00 a.m. No pickets. Everything O.K. Yarnell wells still pumping, Rich-

Respondent's Exhibit No. 23—(Continued)
field-Consolidated and Krug wells still pumping.

(Signed) Rogers

September 6, 1948

6:30 p.m. Arrived Yorba Linda Dehydrator via Santa Ana and Orange. Krug and Yarnell wells still pumping.

(Signed) R. Hight

* * * * *

September 9, 1948

Krug Lease shipping pump running.

Bradford Lease shipping pump running.

Producing wells producing.

Drove to Terminal Island. Removed seals from Royalty Service Company tanks for Standard Oil. Closed 6-inch gate on Royalty Service line. Drove to Los Alamitos Headquarters. Was relieved by Redding at 12 midnight.

(Signed) J. R. Letson

* * * * *

September 14, 1948

12:00 m. Relieved Huso at Headquarters.

12:15 a.m. Checked locks on all gates at Los Alamitos No. 2. Called Dispatcher. Drove to Yorba Linda. Checked all gates to see that locks were on. Checked pump at Buena Park. Had flat tire fixed in Buena Park at C. H. Owen & Sons Station. Returned to Los Alamitos No. 2. Called Dispatcher at 3:00 a.m.

Drove to Huntington Beach. Laboratory, booster pump O.K. Back to Los Alamitos No. 2. Circled

Respondent's Exhibit No. 23—(Continued)
farm. Went to Norwalk Station. Drove around to all gates. Then to Santa Fe Springs Laboratory, back to Los Alamitos No. 2, then to Signal Hill Laboratory and Station. Everything O.K.

Called Dispatcher.

Filled car with gas at Tank 118027.

Relieved by Ray Rogers.

(Signed) Geo. Cody

September 14, 1948

11:00 a.m. L. A. Works via 10-inch line. Checked concrete patch job in alley off Pico in Long Beach. Job is completed. Delivered run tickets to Producing Department. Signal Hill Station; several pickets.

(Signed) R. Rogers

* * * * *

September 15, 1948

12:00 a.m. Relieved Huso at Headquarters. Drove around Los Alamitos No. 2 and checked all gates. Called Dispatcher.

Checked booster pump and tank at Huntington Beach; also Gaugers' Laboratory.

Drove around Los Alamitos No. 2, then to Yorba Linda Station. Checked all gates. Back to Los Alamitos No. 2. Called Dispatcher 2:50 a.m.

Went to Norwalk Tank Farm. Checked all gates. Santa Fe Springs Gaugers' Laboratory O.K. Rode line to Montebello. Everything O.K. Back to Los Alamitos No. 2 via Santa Fe Springs and Norwalk. Called Dispatcher.

Filled car with gas at Tank 118027.

Went to Signal Hill. Checked Laboratory, Signal

Respondent's Exhibit No. 23—(Continued)

Hill Station; also checked lease pumps. Everything seems O.K.

Relieved by Ray Rogers.

(Signed) Geo. Cody

September 15, 1948

10:45 a.m. Yorba Linda Station, O.K. Wells all pumping. Krug pump pumping.

(Identified) R. Rogers

* * * * *

September 18, 1948

Relieved Redding at Headquarters. Called Dispatcher 12:30 a.m.

Drove to Huntington Beach via pipe line. Checked booster and Tank 8010; also laboratory. Circled Los Alamitos No. 2 and checked all gates. Went to Yorba Linda via lines. Checked all gates and lease pumps. Returned to Los Alamitos No. 2. Drove to Norwalk. Checked gate. On to Santa Fe Springs Laboratory. All the leases in Santa Fe Springs are pumping again. There were two pickets at Production Headquarters. On to Montebello. All of these leases are running. Returned to Los Alamitos No. 2. Drove to Signal Hill. Checked Station gate and Laboratory doors. Harlow-Kent, Bauman and Campbell leases are running again. Two pickets at Plant 5 and two pickets at Producing Headquarters.

Called Dispatcher at 6:30 a.m. Returned to Los Alamitos No. 2. Filled up with gas at Los Alamitos No. 1.

Relieved by Letson.

(Identified) Geo. Cody

Respondent's Exhibit No. 23—(Continued)

* * * * *

September 19, 1948

Relieved Redding at Headquarters. Called Dispatcher 12:50 a.m. Drove to Huntington Beach via lines. Booster, Tank 8010 and Laboratory O.K. Back to Los Alamitos No. 2. Then to Yorba Linda via line. All O.K. Back to Los Alamitos. Called Dispatcher at 3:45 a.m.

Norwalk via lines. Santa Fe Springs Laboratory O.K. Two pickets at the Producing Headquarters. Everything O.K. at Montebello. Back to Los Alamitos, then to Signal Hill Station and Laboratory. O.K. Two pickets at Plant 5. Two pickets at Producing Headquarters. O'Neil wells pumping. Back to Los Alamitos No. 2. Called Dispatcher at 6:30 a.m.

Filled car with gas at Tank 118019.

No pickets on Pipe Line property.

Relieved by Letson.

(Signed) Geo. Cody

* * * * *

September 20, 1948

Relieved Huso at Headquarters at 8:00 a.m. No pickets. Circled Los Alamitos No. 2. Two pickets. Called Dispatcher 8:20 a.m. Drove to Signal Hill. No pickets at Laboratory or Station. Ditching machine working on 28th Street. On to L. A. Works to pick up checks for Rogers and myself.

(Noted—F. A. J.)

(Identified) Geo. Cody

September 21, 1948

Left L. A. Works at 11:00 a.m. Went to Signal

Respondent's Exhibit No. 23—(Continued)

Hill. Ditching machine nearly to Gundry. Line laid in ditch up to the east side of station and they started backfilling. All lines seem O.K. No pickets. Called Dispatcher at 11:50 a.m.

No pickets at Los Alamitos No. 1. Circled Los Alamitos No. 2. Two pickets there. Went to Huntington Beach via lines. Booster and Tank 8010 O.K. Tank 4298, Columbia Lease—no numbered seal. Suction closed. Called Dispatcher at 1:30 p.m. Stopped and talked to Letson by Elliot Lease; as we were talking someone came up and gauged Elliot tank. I asked if he knew who it was and he said "A SoCal man. I guess". Left for Yorba Linda. Krug pump running. Station O.K. Tank 2013 open to receive. Called Dispatcher 2:40 p.m. Followed lines back to Los Alamitos No. 2. No pickets.

Filled car with gas at Tank 118027. Went to Signal Hill via lines. No pickets at Los Alamitos No. 1. Well down at Signal Hill.

Relieved by Rogers.

(Signed) Geo. Cody

* * * * *

September 22, 1948

0140 a.m. O.K. Yorba Linda Station O.K. Producing quiet. Talked with pumper who says that several wells were shut down yesterday a.m.

0200 a.m. Rode lines back to Los Alamitos No. 2.

(Signed) J. L. Redding

September 22, 1948

Relieved Redding at 8:00 a.m. No pickets, but Joe

Respondent's Exhibit No. 23—(Continued)

Zeman came up while we were changing shift. One picket at Los Alamitos No. 2. Huso on days at Station. Called Dispatcher at 8:20 a.m. Picket had left Los Alamitos No. 2. No one at Los Alamitos No. 1 as I went by on way to Signal Hill. Pickets and foreman talking at Plant 5-B. No pickets at station or laboratory. Ditching machine is just east of Gundry Avenue. On in to L. A. Works via line. Exchanged book with Jones.

(Signed) Geo. Cody

September 23, 1948

Filled up with gas at L. A. Works. Drove to Huntington Beach via lines. Went to all leases. Didn't see any pickets anywhere. Booster, Tank 8010 and Laboratory O.K. Called Dispatcher at 10:10 a.m. Two blocks east of Stanton on the south side of Orangethorpe the S. E. Con. Co. is tying in a 2-inch gas line—our line not exposed. On to Yorba Linda. Rode Richfield-Consolidated lines; also Krug line. Three leases running. No pickets. Station O.K. Called Dispatcher at 11:30 a.m. Went to Montebello. Everything there about the same. Two pickets at Plant No. 14. Rode lines back to Santa Fe Springs. Checked all lease pumps. Found everything the same here. Two pickets in front of Producing Headquarters. Called Dispatcher at 12:40 p.m. On to Norwalk Tank Farm. Drove through farm and around to back gate. On to Los Alamitos No. 2. Called Dispatcher at 2:30 p.m. No pickets. On to Signal Hill via lines.

(Identified) Geo. Cody

Respondent's Exhibit No. 23—(Continued)

September 23, 1948—(Cont'd)

6:30 p.m. Los Alamitos No. 1. Started and ran motors in trucks and cleaned out desk.

(Identified) R. Rogers

* * * * *

September 24, 1948

Relieved Huso at 4:00 p.m. Circled Los Alamitos No. 2. Called the Dispatcher at 4:30 p.m. Huntington Beach Booster, Tank 8010 and Laboratory O.K. Los Alamitos No. 2 O.K. Yorba Linda Station and tanks O.K. Called Dispatcher at 6:30 p.m.

Buena Park pump O.K.

Circled Norwalk Tank Farm. Santa Fe Springs Laboratory O.K.

Two pickets in front of Producing Department Headquarters.

Whittier Hills lines O.K.

Montebello seems O.K.

No pickets at Plant 14.

Rode lines back to Los Alamitos No. 2.

Called Dispatcher 10:00 p.m.

Circled Los Alamitos No. 2. Los Alamitos No. 1 O.K.

Two pickets at Plant 5.

Two pickets at Producing Headquarters.

Signal Hill Station and Laboratory O. K.

No pickets at any of our places.

Called Dispatcher at 11:45 p.m.

Relieved by Huso.

(Signed) Geo. Cody

* * * * *

RESPONDENT'S EXHIBIT No. 24

September 8, 1948

5:10 to 6:00 p.m. At Huntington Beach Station. Pump O.K. Bottom L on Tank 8010 is badly rusted on southwest side; should be cleaned and repainted. Checked amount of available salvageable scrap steel and pipe. Rode line to Brown Lease. Found Texas Company wells pumping.

8:00 p.m. Yorba Linda O.K. Yarnell wells pumping. Union Oil Company Gas Plant west of Yarnell Lease in operation.

(Signed) R. Hight

September 9, 1948

0430 Huntington Beach Gaugers' Laboratory okay. Production okay. Pearce No. 1 pumping, tank okay.

(Signed) J. L. Redding

* * * * *

September 11, 1948

0600 Huntington Beach Producing O.K. Pearce No. 1 still pumping. Gaugers' station O.K.

(Signed) J. L. Redding

* * * * *

Sunday, September 12, 1948

8:00 a.m. Relieved Huso, Los Alamitos No. 1. No pickets.

8:10 a.m. Ten gallons gasoline in car from Tank 027, Los Alamitos No. 2. No pickets.

9:00 a.m. Rode line to Huntington Beach. Boosters and Tank 8010 O.K. Rode field lines. Pearce, Elliot, Barker, Brown, Towers and Smyth wells still pumping.

Respondent's Exhibit No. 24—(Continued)

September 12, 1948—(Cont'd)

11:00 a.m. Yorba Linda via line. Bradford, Yarnell and Krug wells pumping. Pumping oil from Krug pump to 10,000 barrel tank at station.

(Identified) R. Rogers

* * * * *

September 13, 1948

12 Md. Relieved Geo. Munsell.

12:15 a.m. Drove around Los Alamitos No. 2 and checked locks on gate.

12:45 a.m. Checked gate at Norwalk. All O.K. Drove to Santa Fe Springs Laboratory and around leases and called in at 1:30 a.m. Back to Los Alamitos No. 2 via Norwalk. Checked doors on Laboratory at Signal Hill; also gates at Station. All were locked and O.K. Called Dispatcher at 3:00 a.m. Back to Los Alamitos No. 2. Drove around Tank Farm; left for Huntington Beach. Checked Laboratory, booster and Tank 8010. Back to Los Alamitos No. 2. Called in at 4:45 a.m.

Drove to Yorba Linda. Checked gates to see that they were locked. Back to Los Alamitos No. 2. Drove around Tank Farm; then to Headquarters. Called in 7:00 a.m. Filled up with gas. Relieved by Rogers at 8:00 a.m.

Fog cleared away at about daylight.

(Signed) Geo. Cody

* * * * *

September 15, 1948

0615 Huntington Beach Gaugers' Station, Producing and Pearce No. 1 O.K. Pearce still pumping.

(Signed) J. L. Redding * * * * *

Respondent's Exhibit No. 24—(Continued)

September 16, 1948

2:30 p.m. Santa Fe Springs; covered lines and leases. Most wells pumping. General Petroleum not working at Spring and Florence. Holes still open and barricaded. Leak on Florence west of Norwalk Blvd. has been repaired by General Petroleum. Holes still open and barricaded.

(Signed) R. Rogers.

* * * * *

September 17, 1948

1:30 a.m. Completed inspection of Smythe, Towers, Brown and Barker pumps and Huntington Beach Laboratory; all O.K. Wells operating on Volmer-Meyers, Smythe, Towers and Brown Leases.

2:45 a.m. Arrived Yorba Linda Station via Goldenwest, Hanson and Orangethorpe. Wells operating on Richfield - Consolidated, Krug, Yarnell. Tank 10008 is nearly full (oil within 3-ft. of top). 2009 about half full and open to field. 2008 empty. Station O.K. Called Dispatcher.

(Signed) R. Hight

September 20, 1948

Changed books at L. A. Works. Gave Ray Rogers his check at home. No pickets at Signal Hill. Los Alamitos No. 1 O.K. No pickets. Two pickets at Los Alamitos No. 2. Norwalk O.K. No pickets. Santa Fe Springs Laboratory O.K. Tanks 1174 and 1175, Matern No. 3 lease, suction gates closed but no numbered seals. Also Tank 1146, Matern No. 2 and 1166 Baldwin. Pumps, discharge and suction both closed. Two pickets at Producing Headquarters. Called Dispatcher at 11:15 a.m.

Respondent's Exhibit No. 24—(Continued)

Rode lines to Montebello. Everything O.K. Two pickets at Plant No. 14.

Went to Yorba Linda via pipe line. Saw Letson and Hopkins at Yarnell Lease. Yarnell pump running. Seals broke on Tanks 1217 and 1228. Suction gate open on 1217. Closed on Tank 1228. Stream going into Tank 10006. Called Dispatcher at 1:20 p.m.

No seals on Krug Tanks 1331, 1233, 1235 and 1236. Gate open on Tank 1233. Producing Department gang laying 6-inch waste water line.

No seal on suction of Tank 1219, Richfield-Consolidated Lease. All seals broke on Bradford Lease, Tanks 1223, 1224, 1227 and 1228 and gates are closed.

Left for Huntington Beach via lines. Buena Park No. 4 O.K. Well still down. Laboratory, booster pumps and Tank 8010 O.K. Called Dispatcher at 2:30 p.m. Drove back to Los Alamitos No. 2 via lines. Called Dispatcher. He reported a leak on the west side of Bloomfield $\frac{1}{4}$ mile north of Union Oil Gas Plant in Santa Fe Springs. This was at 3:15. Leak checked. It is on the east side of Bloomfield and the north side of Flagon Street right on the curve in front of the Union Oil Company Gas Plant. Union Oil gang is digging it out and said they would clamp it. It is wet oil.

Filled car with gas at Tank 118027. No pickets.

Relieved by Redding.

(Signed) Geo. Cody

September 20, 1948

0630 Production quiet. No pickets. Pearce No.

Respondent's Exhibit No. 24—(Continued)
1 pumping. Riding lines back to Los Alamitos No. 2.
Drove around inside farm. All O.K.

(Identified) J. L. Redding

* * * * *

September 21, 1948

Relieved Huso at Headquarters. Two pickets on duty. Circled Los Alamitos No. 2. Two pickets. Called Dispatcher at 8:20 a.m. As I left Los Alamitos No. 2 two more pickets showed up. Drove to Santa Fe Springs via Norwalk Tank Farm. No pickets. Found leak on Foix Lease in Santa Fe Springs. Reported it to Carter, Producing Foreman, and he said "let it leak". There were four guards at his house when I drove up. I asked them where they were from and they said "a concern in Los Angeles". Large picket line forming around Producing Department Field Office. Several pickets at L. A. Works. Changed book with Jones 10:00 a.m.

(Signed) Geo. Cody

September 22, 1948

Left L. A. Works at 9:15 a.m. Had car serviced at Jay's Station. Back to Signal Hill. Two pickets in front of Producing Headquarters. Two pickets at 5-B. Called Dispatcher. Drove to Los Alamitos No. 2 via lines. All wells shut down on Signal Hill. No pickets at Los Alamitos No. 2. Three at Los Alamitos No. 2. One, Frank Whitten, asked if he could take his vacation. I told him I would find out. Huntington Beach via lines, booster Tank 8010 and Laboratory. Seal broken on Tank 4300. No pickets. Wells all running. Called Dispatcher at 11:40 a.m. Left for Yorba

Respondent's Exhibit No. 24—(Continued)

Linda. Most of the wells are shut down. Talked to Pumper and he said about eight or nine pickets were here this morning and the Producing Department gave orders to shut the well down. Went around field. New Bradford well still running. Talked to Hopkins and he said they would run them until tanks were full. Station locked O.K.—2013 open to field. All tanks are full, the Producing Pumper told me. Called Dispatcher at 12:30 and left for Montebello and Whittier Hills. Some wells are running in Montebello. Two pickets at Plant 14. Rode lines back to Santa Fe Springs. All leases shut down. One picket at Plant 9. Leak has not been fixed at Foix, but leak has stopped, due to shutting down wells.

Called Dispatcher at 2:00 p.m. Went to Norwalk. O.K. On to Los Alamitos No. 2. No pickets at Los Alamitos No. 1 or No. 2. On to Signal Hill. Bush Oil Co. well blowing water to top of rig. Fireman and Police are there, about 1/2 block southwest of Ellis Lease.

Called Dispatcher 3:45 p.m.

Relieved by Rogers.

(Signed) Geo. Cody

* * * * *

September 23, 1948

0550 Station O.K. Called Dispatcher. Production quiet. Pearce No. 1 pumping. Gaugers' Laboratory locked. Stopped to eat.

(Signed) J. L. Redding

Relieved Redding.

No pickets at Los Alamitos No. 1 or Los Alamitos

Respondent's Exhibit No. 24—(Continued)

No. 2. Signal Hill Laboratory and Station O.K. No pickets. Two pickets at Plant 5. On. Ditching machine about halfway between Gundry and Walnut. Backfilled up to the west side of Gundry. Went to L. A. Works to change books. Several pickets and police in front of refinery gate.

(Signed) Geo. Cody

Q. (By Mr. Brooks): Mr. Dreyer, I would like to direct your attention now to September 28, 1948, and ask you if you had a conversation that day with Mr. Cody? A. I did.

Q. Where did it occur?

A. In Mr. Jones' office, at the L. A. Works.

Q. Who was present?

A. Mr. Jones, Cody, and myself.

Q. How did you happen to be present at that time with the other two?

A. It was just about noontime. I was leaving my office and I was in the hall. As I passed the door to Mr. Jones' office I saw Mr. Cody in there and I went in.

Q. Will you tell us what happened at that time and what was said by whom, as best you can now remember?

A. The part of that conversation that I recall was a discussion with Mr. Cody in regard to gauging.

Q. Will you tell us how this conversation started, or who opened it, and what was said?

Mr. Hackler: May that answer be stricken?

Mr. Brooks: It may be stricken.

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: That may be stricken. [2554]

The Witness: The conversation had to do first with an injury to Mr. Cody's shoulder.

Q. (By Mr. Brooks): May I interrupt you again, Mr. Dreyer. You haven't been around here while this hearing has been going on, but we must have your best recollection of the substance at least of what was said, rather than conclusions. It is a little technicality. Would you mind telling us now as best you can the substance of what was said and by whom? Of course, if you can give the exact words, of course that is what we want.

A. My best recollection is that when I entered the room I asked Mr. Cody how his shoulder was. He replied to the effect that he was able to work, that his shoulder was not in any condition that would prevent him from working.

Q. Why did you make inquiry about his shoulder? Had something happened?

A. He had been in an automobile accident a few days previously.

Q. Had he not been working immediately preceding this conversation, if you know?

A. No, sir. Mr. Cody had not worked. It had been his regular days off for, I think, three days immediately preceding this conversation.

Q. Very well. Now, after this opening of the conversation wherein you inquired and he responded with respect to his [2555] shoulder, what happened?

(Testimony of Elmer L. Dreyer.)

A. I instructed Mr. Cody to go to the Yorba Linda station.

Q. Will you tell us as best you can what you said?

A. I said, "George, I want you to go to the Yorba Linda station and gauge, sample, take temperatures on the tanks. We need the information for the first of the month reports," meaning by that our October 1st reports.

I said, "We have been advised that there are no pickets at the station. There may be some from time to time. If there are, select any time between now and the 1st of October to do the work. Don't get into any argument with the pickets if there are any there, but back off. We don't want it that bad."

Mr. Cody said that he could not do it, or would not do it.

I instructed him a second time to do the work and he again refused. So then I told him there was only one thing left for me to do, and that was to make out his final pay order, and then I left the room.

Q. How long were you in there with Mr. Cody and Mr. Jones?

A. Oh, possibly ten minutes.

Q. Do you remember anything else that was said by you or by Mr. Cody or by Mr. Jones while you were there?

A. No, sir, nothing other than I have already stated.

Q. Did you at that time tell Mr. Cody to prepare the [2556] station to operate?

(Testimony of Elmer L. Dreyer.)

A. I did not.

Q. Did Mr. Jones say anything while you were in there that you remember? A. No, sir.

Q. Describe the monthly reports you made reference to.

A. As of the first of each month complete inventory reports were prepared, showing all of the oil stocks in all of the tanks. These are tabulation reports, two of them particularly, one known as tankage and stock report, and the other one showing the summary of the oil on hand, which is called the trial balance.

* * * * *

Q. Well, what else, now, was said that you have not told us about?

A. It comes back to me that when Mr. Cody refused to do the gauging and sampling work that I had instructed him to do at the Yorba Linda tanks, I told him that he would have to decide whether he was going to be on our team or not.

Mr. Cody then replied, "Can't I be on a team of my own?"

And I said, "No, there are only two teams in this game."

Q. Was there anything else said that you now recall?

A. No, I don't recall anything now.

Q. Did you leave the room first of those three, Mr. Dreyer? A. I did.

Q. What did you do, now, after you left the room?

(Testimony of Elmer L. Dreyer.)

A. I went back to my office and instructed the secretary to make out a final pay order for George Cody.

Q. When did you next see Mr. Cody, if you remember?

A. I don't remember seeing him again until the 8th of November, 1948.

Q. Did you see him at that time by any previous arrangement? A. Yes. [2558]

Q. How was it made?

A. Mr. O'Connor called me on the telephone and asked me if I would have any objection to seeing Cody. I told him no, and an arrangement was made for a meeting with Cody. That was done a day or two previous to November the 8th.

Q. Where did you see him on the 8th?

A. In my office.

Q. Who was present?

A. Mr. F. A. Jones, Cody, and myself.

Q. Well, will you tell us as best you can remember at the present time what was said in that conversation, and again try your best to tell us the substance of what was said by each person.

A. First, Mr. Jones did very little of the talking. Cody and myself carried on the conversation principally. Cody told me that he would like to have his job back as assistant foreman—assistant district foreman. We discussed the reasons for his being dismissed—

Mr. Hackler: I move the answer be stricken.

Mr. Brooks: That may be stricken.

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: So ordered.

Q. (By Mr. Brooks): You tell us what was said, Mr. Dreyer. Just tell us as best you can the substance of what you said and what he said.

A. I was trying to get it in some sort of order.

Mr. Hackler: We want it in the order of the conversation. You understand that? We want it in the order of the conversation as you recall it.

The Witness: That is what I was trying to do. Mr. Cody told me that he had refused to perform the work assigned on September the 28th because he was afraid that if he did, his home or his person or his family would be injured, that his condition or circumstances were different than other employees, because of the particular activities he had taken in committee work.

I told him that that was not sufficient reason for refusing to do the work. Mr. Cody told me in the conversation that Mr. O'Connor had sent for him, that he had not asked to see Mr. O'Connor. Mr. Cody told me that during the conversations with Mr. O'Connor, that Mr. O'Connor had told him that had he, meaning Mr. O'Connor, been in my place, he would have granted Cody a leave of absence.

I told Cody that during the strike period all available men, particularly supervisors, were needed and that we could not grant any leaves of absence or any vacations during that period.

At the end of the conversation or toward the end of the conversation I told Mr. Cody I would consider

(Testimony of Elmer L. Dreyer.)

his request for reinstatement and that I would advise him at a later date. [2560]

Q. (By Mr. Brooks): Do you remember anything else now that was said?

A. Mr. Cody referred to his——

Q. Tell us what was said.

A. Mr. Cody said that in view of his 21 years' service and experience and training that he had—well, that those were points in favor, that should be given favorable consideration to his reinstatement.

Q. I believe you testified you told Cody you would think it over; is that right?

A. Or words to that effect.

Q. That you would call him? A. I did.

Q. Did you call him? A. I did.

Q. How long afterwards, what date, if you remember?

A. It was on the 11th of November, 1948.

Q. This was a telephone call?

A. This was a telephone call from me to Cody.

Q. What was said in that telephone conversation?

A. I told Cody that I had carefully considered his request for reinstatement and that I could not reinstate him. I told him that I wished him luck in finding work some place else. He thanked me and that was the end of the conversation.

Q. When did you next see George Cody? [2561]

A. I think it was on November 16, 1948.

(Testimony of Elmer L. Dreyer.)

Q. Did you see him at that time by pre-arrangement? A. Yes, sir.

Q. What was that pre-arrangement?

A. Mr. Cody phoned me on the afternoon of November 15th and asked to see me that afternoon. I was unable to see him at that time and made a tentative appointment for the morning of the 16th, asked him to phone me on the morning of the 16th to confirm that appointment. He did.

Q. Where did you see him on the 16th?

A. In my office.

Q. Who was present?

A. Mr. F. A. Jones, Cody, and myself.

Q. Will you relate to us now, Mr. Dreyer, as best you can, what was said by whom in that conversation?

A. In this conversation Mr. Cody told me that when I phoned him on November 11th that was the first time he realized that he had made a serious mistake in not performing the work on September 28th, the work I had instructed him to do.

He asked me at that time if there was any work for him in the pipe line division, even in a classified occupation. I think he used the words "even in the gang."

I told him again that I would consider his request and advise him later as to my decision.

During this meeting Cody also stated that he wanted to [2562] preserve his 21 years' service record.

(Testimony of Elmer L. Dreyer.)

Mr. Hackler: That is objected to and I move it be stricken.

Mr. Brooks: Can't he state what the man said?

Mr. Hackler: I have been rather patient.

Trial Examiner Scharnikow: Not responsive?

Mr. Hackler: Not responsive, purely voluntary, not in the context. I haven't objected thus far to this witness rambling.

Mr. Brooks: I asked him what he said.

Mr. Hackler: What he remembers Cody saying. We don't have a conversation in any form——

Trial Examiner Scharnikow: I think you are entitled to that. However, I will not strike the answer. I think you should have the witness tell us——

Mr. Brooks: Is this an instruction? Am I to pinpoint these conversations and bring them out? I did that with one witness and it was objected to strenuously. I asked the man to tell us what was said. He told it in narrative form, I admit.

Trial Examiner Scharnikow: That is true. Let us find out definitely, in view of the length of the answer, whether this is in the order these things happened, so far as the witness now recalls. I will not strike any part of the answer, however. [2563]

Q. (By Mr. Brooks): Mr. Dreyer, you have testified that at this time Mr. Cody asked whether there was a vacancy in the pipe line division in a classified position, is that right?

A. He asked me if he could be employed in a classified division.

Q. You have also stated that he said——

(Testimony of Elmer L. Dreyer.)

Mr. Hackler: Just a moment. It is obvious this is going to be leading. There is no reason why this witness can't relate a conversation as others did. I will refer you to the record when our boys were testifying to conversations. This is a crucial matter and everyone knows it.

Trial Examiner Scharnikow: Let's find out the order in which these things were said.

Q. (By Mr. Brooks): Mr. Dreyer, would you tell us the order in which these conversations occurred, as best you can?

A. I don't know at this stage the order in which the conversations occurred.

Q. Tell us what was said in response to what, as best you can recall.

A. During the conversation Mr. Cody said to me that he was over 40 years old; that it was difficult to find work any place else; that he wanted the job back with The Texas Company; that he wanted to preserve his 21 years' service record.

Q. What, if anything, did you say in response to that?

A. I told Mr. Cody that I would consider his request and advise him—I told him at that meeting that if I gave him the answer then and there, the answer would be no, but that I would consider the request and advise at a later date as to my decision.

Mr. Cody said, "Then, please don't answer me now."

That was about the end of the meeting.

Q. When did you next talk to Cody?

(Testimony of Elmer L. Dreyer.)

A. Some three or four days later. I think **about** the 19th of November.

Q. How did you talk to him at that time?

A. I called him at his home on the telephone.

Q. What was said at that time by you and by Cody?

A. I told Cody that my decision was that he could not be reinstated in any position, and I told him that I hoped he would have good luck in finding work some place else. He thanked me.

Q. Is that all that was said in that phone conversation?

A. That is all that I recall.

Q. Do you remember when you saw Cody next, to talk with him, or see him at all?

A. I saw him again on February 1, 1949.

Q. Did you talk with him by phone before February 1st and after this phone call in November?

A. Yes, I talked to him in January of '49.

Q. By telephone? A. By telephone.

Q. Did he call you or did you call him?

A. He called me.

Mr. Brooks: May we take time out at this time to get these exhibits straightened out? The photostats have now returned and I want to get them into the hands of the reporter.

Trial Examiner Scharnikow: Very well. We will recess for 10 minutes.

(Short recess taken.)

Trial Examiner Scharnikow: On the record.

(Testimony of Elmer L. Dreyer.)

Q. (By Mr. Brooks): I believe, Mr. Dreyer, that before the recess you testified about a telephone conversation from Cody to you. Is that correct?

A. That is correct.

Q. Let's see, I believe you said that was January, in January.

A. Yes, sir. He called me about the middle of January.

Q. What was that conversation as you now remember it?

A. Cody asked for an appointment to see me. I made an appointment to see him that same day, and that was the end of that particular conversation with me.

Q. Did you see him that day?

A. No, I did not. [2566]

Q. Did you talk to him again?

A. Not on that day, no, I did not.

Q. Was the appointment canceled?

A. The appointment was canceled.

Q. How?

A. My secretary reported to me that in my temporary absence from the office, Cody had phoned and said that he had received another phone call, that he would not be able to keep the appointment, and that he would get in touch with me later.

Q. Did he? A. He did.

Q. When? A. On the 1st of February.

Q. How?

A. He phoned me at my office.

Q. What was said?

(Testimony of Elmer L. Dreyer.)

A. He asked if he could come over to see me, and I made an appointment with him to see him that same afternoon. I told him to come over that same afternoon.

Q. Did he come over that afternoon?

A. He did.

Q. Did you have a conversation with him?

A. I did.

Q. Was anyone present other than you and Cody? [2567]

A. Mr. F. A. Jones.

Q. What was that conversation, Mr. Dreyer?

A. Cody again asked for reemployment in the pipe line division.

Q. Mr. Dreyer, will you tell us what was said?

A. Mr. Cody said, "Is there any job available for me in the pipe line division?"

I told him that the matter had been fully considered, that there was no job for him in the pipe line division.

He asked me my ruling was final, and I told him that it was, and that my authority was final.

Cody asked me if I had the final say-so in the matter and I told him yes, that I did.

Mr. Cody, as he left the room, he stopped in the doorway and turned and said that he had done everything possible to convince me to put him back to work, but that he would not give up trying to get his job back to preserve his 21-years service record.

Mr. Hackler: Will you read the last answer back, please?

(The answer was read.)

(Testimony of Elmer L. Dreyer.)

Q. (By Mr. Brooks): Did you make any response to that?

A. Not that I recall.

Q. Was there anything else said in that February 1st conference which you now recall which you have not told us?

A. There were other things said, but I don't recall them [2568] here now.

Q. You can recall nothing else at the present moment that was said in that conversation?

A. I have been thinking during the interval and it comes back to me that Cody said, "Is there any chance for a job in any other department of the company?"

I told him that my authority was limited to the pipe line department and that I had nothing to say about any of the other departments or divisions of the company.

Q. Do you recall anything more now?

A. No, sir, I don't, not right now.

Q. I want to ask you, Mr. Dreyer, if it refreshes your recollection if I inquire whether or not anything was said about the nature of the offense on September 28th, at this conversation, the nature, or the severity, or the gravity of the offense.

Mr. Hackler: It is a leading question for the purpose of refreshing the witness' recollection?

Mr. Brooks: That is right.

The Witness: At one of the conversations, and I think it was the February 1st conversation, Mr. Cody stated that other employees had from time to time

(Testimony of Elmer L. Dreyer.)

committeed offenses for which they had been penalized, such, for example, as by a layoff without pay, but that in his case he had been discharged and not penalized. [2569]

He stated that he thought that this penalty was unusually severe.

I told him that in considering his case I had taken into account the fact that I thought his refusal to work was premeditated, that it wasn't anything done on the spur of the moment.

I referred back to our conversation of November 8th, which it now comes back to me that in that conversation I had asked Cody if he would go into Plant 5 at which I thought there were picket lines. [2570]

Cody on November the 8th said no, that he would not pass through the picket lines, that I should ask somebody else to do that.

Mr. Hackler: I move that this answer be stricken, Mr. Examiner. What we have here is a garbled version of two conversations.

Mr. Brooks: He has identified them.

Mr. Hackler: The question is what the man said. He says now, "I recall something I said back in an earlier conversation."

Trial Examiner Scharnikow: It makes it very difficult for counsel to follow it.

Mr. Hackler: His memory was completely exhausted as to the other. He could have been properly refreshed if refreshment he needed as to the other.

Trial Examiner Scharnikow: I certainly am not

(Testimony of Elmer L. Dreyer.)

going to stop the witness from testifying to anything that is material, Mr. Hackler.

Mr. Hackler: I don't expect you to, but we are up here in February now and get a long, rambling account of something he thinks he said in an earlier conversation.

Trial Examiner Scharnikow: He didn't say he thinks. He is now testifying directly.

Mr. Hackler: Then he switches over to an incident that happened back in November. I move the answer be stricken and [2571] we start fresh on what the witness knows about this conversation.

Trial Examiner Scharnikow: No, I won't strike it. I think the answer is clear. There is no question about its being material.

Mr. Hackler: Let's have that answer read.

(The record was read.)

Trial Examiner Scharnikow: I will deny your motion to strike.

Mr. Hackler: You understand the motion is directed to the last portion of that answer with reference to the passing through the picket line proposition and not to the first part which appeared to be at least a statement of what took place in this conversation.

Trial Examiner Scharnikow: Yes, the last part of that answer.

Mr. Hackler: Of course, none of it is responsive to the question, which was, "Does this refresh your recollection?"

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: I will deny the motion to strike.

Q. (By Mr. Brooks): Mr. Dreyer, you heard the answer read back. Have you now exhausted your recollection regarding what was said on that subject at this conversation of February 1st?

A. In the February 1st conversation I referred and told [2572] Cody that on November the 8th he had stated at that time he would not as of November the 8th pass through a picket line.

Q. Did he respond to that?

A. He made no answer to that on February the 1st, no.

Q. What else did you say, if anything, in that connection?

A. I told him in that connection that having refused to do the work on September the 28th and apparently being of the same mind on November the 8th, that that made his offense different, more severe than the cases he had referred to as suffering only penalties rather than being discharged. [2573]

* * * * *

Cross-Examination

(By Mr. Hackler): Mr. Dreyer, referring to page 1 of Respondent's Exhibit 24, which is your log for September 9, 1948, Mr. Brooks directed your attention to an item recorded in that log by J. L. Redding, which reads "Pearce No. 1 pumping, tank O.K." From that item can you tell where that oil was going that was being pumped?

(Testimony of Elmer L. Dreyer.)

A. Yes, I think—— [2650]

* * * * *

Q. Then Mr. Brooks invited your attention to the facts on page 5 of the same exhibit, down at the bottom, in an item signed by Rogers, at 9:00 o'clock a.m., of September 12th, that the Pearce and some other named wells were still pumping. A. Yes.

Q. You note that? A. I see that.

Q. Then, in the same exhibit, on page 7, he invited your attention to an item of September 15th, at the bottom of the page, under the time 0615, where it says "Pearce still pumping." A. I find that.

Q. You find an item on page 11 to which your attention was invited on the report of Mr. Redding, again, for September 20th, in which he said Pearce No. 1 was still pumping? A. I find that.

Q. You find those items? A. Yes.

Q. Can you refer to the gathering chart there and tell us when gathering operations took place with reference to Pearce 1? I am referring now to Respondent's Exhibit 16.

I will strike that.

What field is Pearce 1 in?

A. Pearce 1 is in the Huntington Beach field.

Q. The Huntington Beach field—let me ask you preliminarily, on Respondent's Exhibit 16 it appears to have been gotten up [2651] so that chronologically you have earliest dates up to the latest dates by fields, do you not? Do you note that?

A. That is correct.

Q. On the first page of that exhibit we find the

(Testimony of Elmer L. Dreyer.)

Huntington Beach gathering operations starting down in the lower third, with a movement on the 8th day of September of the J. H. Marion oil from a location known as Cole 4. You note that?

A. That is correct, I note that.

Q. It was gauged and tested by the Southern California Oil & Refining Company.

A. The correct name is So-Cal.

Q. So-Cal Oil & Refining. Going down there, I will ask you if it isn't a fact that exhibit shows the only gathering operation of oil from the well known as Pearce and indicated here, occurred on the 27th of September, so far as the exhibit is concerned.

A. That is the only gathering operation in the Pearce lease that occurred during that period of time. [2652]

* * * * *

Q. (By Mr. Hackler): In the course of their riding these lines and observing anything you expected them to report anything amiss they might see in the production, purely production areas, did you not? A. That is correct. [2660]

* * * * *

Q. (By Mr. Hackler): Now, is it a fact that every time that a gate is opened, that does not indicate that there is necessarily a flow of oil, does it, into the gathering system?

A. No, a gate could be open without flow of oil.

Q. It is sometimes opened to equalize pressure as between gates?

A. Not in the usual course. It could be done.

(Testimony of Elmer L. Dreyer.)

Q. It is done sometimes, isn't it?

A. Infrequent occasions. [2668]

* * * * *

Q. (By Mr. Hackler): Referring now to page 13 of Respondent's Exhibit 24, concerning which you were questioned, Mr. Brooks invited your attention to an entry there. It says, "The New Bradford well is still pumping." In what field is the New Bradford well?

A. The Bradford well is in the Richfield Field.

Q. Can you refer to the Richfield Field on Respondent's Exhibit 16 and tell me on what date oil was gathered from the New Bradford well?

A. I don't offhand know whether the Bradford well referred to in the notes as the New Bradford well is on Bradford No. 1 or Bradford No. 2 Lease. There are two identifications.

Q. You don't know what he had reference to by "New Bradford"?

A. All that I know is that there was a new well on one of the Bradford leases, and that was the one he was referring to, but I don't know which lease that is.

Q. Will you check and see if either of the Bradford wells—there is any movement into the gathering system on the 22nd of [2669] September when this entry was made?

A. No, there is no movement indicated for either of the Bradford leases for the 22nd of September.

Trial Examiner Scharnikow: Now, this is referred to as the New Bradford well. Was that well

(Testimony of Elmer L. Dreyer.)

served by the gathering system on September 22nd?

The Witness: Yes, it was.

Q. (By Mr. Hackler): Now, there is a notation in the same September 22nd entry of Cody as to Huntington Beach wells all running. Do you note that? A. I do.

Q. Will you look on the other chart here and indicate on that date what movements of oil were being handled by the pipe line facilities, Huntington Beach?

A. The only movement shown on the 22nd is a shipment from the Termo Oil Company.

Trial Examiner Scharnikow: Movement to?

The Witness: No, from the Termo Oil Company.

Q. (By Mr. Hackler): On the 22nd. Is that correct? A. That is correct, on the 22nd.

Q. And it further shows as to that shipment that it was gauged by a SoCal employee. Is that correct?

A. That is correct.

Q. And was pumped by a Termo Oil Company employee. A. That is correct. [2670]

* * * * *

Q. (By Mr. Hackler): Now, that item, "Wells all running," how many wells are there approximately at the Huntington Beach Field?

A. I don't know. I would say maybe somewhere between 25 and 50. I mean Texas Company wells.

Q. Texas Company wells. This wasn't a Texas Company well that this movement went from, was it?

A. No, sir.

Q. It wasn't a Texas Company well, nor was the shipment processed by The Texas Company, was it?

(Testimony of Elmer L. Dreyer.)

A. It went through part of The Texas Company gathering system, and the run ticket was made out by a Texas Company employee.

Q. It was gauged and pumped by the people who owned the [2671] oil lease, wasn't it?

A. It was gauged by the company who finally received the oil. That is the SoCal Oil and Refining Company. And pumped by employees of the Termo Oil Company.

Q. Now, this item, "Wells all running," does that have reference to the fact that the well pumps were operating? Would you so understand it?

A. I do.

Q. You could see that from the road, couldn't you, just as a matter of observing a rocking beam in most instances, wasn't it?

A. That would be true in most instances.

Q. Sometimes they are in a shed, aren't they, but more frequently they are out in the open?

A. Generally, in the Huntington Beach, you could see when it was in operation.

Q. Look out and see some rocking arms. Isn't that right?

A. That is correct.

Q. But so far as the pipe line operations were concerned, you have indicated the only one you observed from that field on that day.

A. That is correct.

Q. Now, it says here further, "Some wells are running in Montebello." Will you check the Montebello Field here and check your exhibit and show

(Testimony of Elmer L. Dreyer.)

me all of the gathering that went [2672] out of the Montebello system?

A. The exhibit indicates that there was no gathering from the Montebello Field from September the 4th to September 27th.

Q. It doesn't show anything in the pipe lines moving out there, does it?

A. No; that is correct.

Q. But it does show here Cody at least reported that some wells were running over there.

A. That is right.

Q. You understand that to mean that is the pump on the top of the well? A. That is the well pump.

Q. Well pump, let's call it, then.

Now, he says he talked to a man named Hopkins and Hopkins said he ran the tanks until they were full. Do you know who Hopkins was?

A. A producing department employee.

Q. He wasn't under your supervision or under Cody's was he? A. That is correct.

Q. To what tanks would reference be there?

A. I can't tell by the context. It could have been the producing department tanks or could have been the pipe line tanks at our station.

Q. Is there a pipe line tank there at Montebello?

A. No, sir, because that note follows after Yorba Linda, [2673] and where Cody said, "New Bradford well still running," that indicates to me that he was still at Yorba Linda.

Trial Examiner Scharnikow: Richfield?

The Witness: Richfield.

(Testimony of Elmer L. Dreyer.)

Mr. Hackler: Richfield Lease.

The Witness: Yes.

Q. (By Mr. Hackler): A production man, according to this, told him he was going to run until the tanks out there were full.

A. That is correct.

Q. You don't know whose tanks those would be, from this report here?

A. Not from this, I can't tell.

Q. Do you have pipe line tanks out there?

A. We have tanks out there at our Yorba Linda station in the Richfield Field.

Q. Can you tell from the Tank 2013, whose tank that was? Is that a pipe line tank?

A. A pipe line tank.

Q. What does the reference mean, that it is open to the field?

A. That means that the valve on the tank—the valve in the line coming in to the tank was open so that oil coming from the gathering system in the field would be directed into that tank. [2674]

Q. Then he says, "All tanks are full, the producing pumper told me." Would that indicate there was a producing pumper observing that operation going on there?

A. That indicates that there was a producing pumper working. I don't know whether that "All tanks" refers to pipe line tanks or producing department lease shipping tanks.

Q. When the lease tanks get full, of course, they would shut down, unless there was some movement

(Testimony of Elmer L. Dreyer.)

into the pipe line system, wouldn't they? They would have to.

A. Unless the oil was removed by tank trucks or in some other fashion.

Q. Was there any of that movement to your knowledge during this period of the strike?

A. There was.

* * * * *

Q. I invite your attention to page 14 of Respondent's Exhibit 23, covering an item of Cody's on the 18th day of [2675] September, as to which you testified. It says there that all of the leases in the Santa Fe Springs area are pumping again, on the 18th of September. By reference to Respondent's Exhibit 16 could you tell me what movements, if any, there were on that day at Santa Fe Springs—"All leases in Santa Fe Springs are pumping again"?

A. To me that entry means that all of the wells were pumping, not the lease shipping pumps.

Q. "On to Montebello. All of these leases are running." That has reference to the movement of the wells pumping?

A. To me it has that meaning, yes.

Q. Since you have already testified that there was not any gathering from Montebello during the period, is that correct? A. That is correct.

Q. "Drove to Signal Hill. Checked station gate and laboratory doors. Harlow-Kent, Bauman, and Campbell leases are running again."

Are those in Signal Hill?

(Testimony of Elmer L. Dreyer.)

A. Those are in the Signal Hill Field, yes, sir.

Q. Referring to Respondent's Exhibit 16 and the Signal Hill portion of it, does it show any movement of oil into pipe line system from that field during, or for these particular three wells I just mentioned——

A. No, there is no movement shown for the leases you just mentioned. [2676]

* * * * *

Q. Now, I notice on page 15 of this Respondent's Exhibit 23 your attention was called to a statement over Cody's signature on September 19th, that the O'Neil wells are pumping. Where are they located, in what field?

A. The O'Neil wells are located on the O'Neil Lease in the Signal Hill Field.

Q. The same answer would apply, would it not, that during this period under consideration there was no movement of oil from the O'Neil wells into your system? A. That is correct. [2677]

Q. Referring now to page 17 of Respondent's Exhibit 23, your attention was invited to an item there that "Tank 2013 is open to receive." Do you note that? A. I do.

Q. Do you know on what lease that is?

A. Tank 2013 is a pipe line tank at our Yorba Linda station.

Q. It could serve any of the leases there?

A. Oil could be received in that tank from any of the leases in the Richfield Field, to which our system is connected.

(Testimony of Elmer L. Dreyer.)

Q. That would indicate that oil was going into this tank from some operation out there, is that right?

A. That is correct.

Q. Or at least it was open to receive oil.

A. It was open, ready to receive it.

Q. Indicate whether oil was actually moving or not?

A. Of itself it does not show whether the oil was actually moving.

Q. Above that we have an item—where is the Elliot Lease?

A. The Elliot Lease is at Huntington Beach.

Q. That would indicate it did not take place near this tank, is that right?

A. That is correct.

Q. Mr. Cody recites a conversation he had there with Mr. Letson, by the Elliot Lease at Huntington Beach, doesn't he? [2678]

A. It does.

Q. Now, referring to September 21st at the Krug Lease, the last movement of oil shown on Respondent's Exhibit 16 was on the day before, the 20th, was it not?

A. That is the last date shown for a movement, on the 16th. However, if a movement started on the 20th, carrying over to the 21st, it would in our records be reported on the 20th under these circumstances.

Q. Let's be sure what we have here. When you say that this is the movements of oil, you mean to say they may have started that day and continued continuously thereafter?

A. They may have continued for more than the one day, yes, sir.

(Testimony of Elmer L. Dreyer.)

Q. What is the fact in regard to the exhibit when it was prepared?

A. The exhibit was prepared from the original record, which is the run ticket. And the run ticket is dated, the date of the run ticket is the date on which the tank is started to ship. Under other than strike conditions we frequently have what we call split tickets. In other words, we make a ticket for each day on which a tank is shipped. Even one shipment may have more than one run ticket; during the strike period we did not do that. It is very possible and very probable a shipment started from the Krug Lease on the 20th, if it did, it would carry over and continue into the 21st. [2679]

Q. It is your testimony that, so far as this exhibit is concerned, then, that you only show the time the shipment started? A. That is correct.

Q. That is all you purport to show on this copy, is that right? A. That is right.

Q. You don't know how long after that it might have persisted then?

A. I don't know, but generally it would not continue for more than into the following day.

Trial Examiner Scharnikow: That is because of the capacity of the tank?

The Witness: As compared to the pump. There may be more quantity of oil in the tank than the pump can pump out in one day. [2680]

* * * * *

Q. (By Mr. Hackler): Mr. Dreyer, I note on Respondent's Exhibit No. 16, the second page thereof,

(Testimony of Elmer L. Dreyer.)

some oil movements in the Whittier Hills Field. Do you note that, sir, some four movements, I believe?

A. That is correct.

Q. Are there any pumps at that field?

A. No Texas Company pipe line division pumps.

Q. Pumps that in normal operations are operated by Texas Company employees; is that right?

A. That is correct. [2690]

* * * * *

Q. Now, after November 16th, on which date, according to my notes, you testified you had a meeting with Cody, were there any other new hires in jobs under your supervision?

A. There were. [2705]

Q. How many?

Mr. Brooks: Mr. Examiner, is it material as to the number? If the question here relates to whether the pipe line division employed people in jobs for which Cody was qualified, after November 16th, we will stipulate that such was done. Is it material to go into the number? I just think that it will take time.

Trial Examiner Scharnikow: Will you stipulate—I am concerned, of course, with a meaningful stipulation for my purposes. Are you stipulating that on November 16th and at all times thereafter there was an open available job of the specific type which Cody could fill?

Mr. Brooks: I can't stipulate that on the 16th and at all times.

(Testimony of Elmer L. Dreyer.)

Trial Examiner Scharnikow: Will you stipulate that that was the fact on November 16th?

Mr. Brooks: I can't do that. I am not advised on that, if that is the question.

Trial Examiner Scharnikow: That was the question. I think that is the intent of the question.

Mr. Hackler: I will rephrase the question, and perhaps we can get it as quickly by testimony.

Mr. Brooks: All right.

Q. (By Mr. Hackler): According to the record I have on the 4th day of September a strike settlement agreement was [2706] entered into which I believe bears your signature. Do you recall entering into the strike settlement agreement with reference to the pipe line people?

A. I do, but I think you mentioned the wrong date. I understood you to say the 4th day of September, and it was the 4th day of November.

Q. I am sorry, and I see by referring to the exhibit that it bears the signature of Mr. O'Connor on the strike settlement agreement.

A. The strike settlement, but I signed the agreement which resulted from that.

Q. And the collective bargaining agreement does bear your signature, that is the pipe line agreement which has been received into evidence.

A. That is correct.

Q. Following the strike settlement agreement and the signing of the contract, the remaining strikers in your department were promptly scheduled back to work, were they not?

A. That is correct.

(Testimony of Elmer L. Dreyer.)

Q. I believe the strike settlement agreement provides that "The refining department agrees it will schedule these employees to return to work in job classifications they occupied on September 3rd, such schedules to provide for return to work in an orderly manner consistent with good operations and all employees to be at work within 5 working days after execution [2707] of the new agreement referred to."

Do you recall that provision of the settlement?

A. I recall a provision of that nature, yes.

Q. And then the people remaining strikers were scheduled back promptly after the settlement and the contract, were they not?

A. That is correct, all except one or two who had obtained work elsewhere and did not return.

Q. That is what I was going to get at. Do you know that there were several or some of the strikers who did not desire to return?

A. Yes, there are at least two.

Q. Do you know Mr. Dawson? A. I do.

Q. Was he one who did not return?

A. He was one.

Q. Sir?

A. He was one of those who did not return.

Q. What was his job prior to the strike?

A. I am not sure, but his length of service, he would probably have been a roustabout.

Q. How about Grant? Do you know a Mr. Grant who worked under your supervision before the strike?

A. I do. I do recall that we had a Mr. Grant.

(Testimony of Elmer L. Dreyer.)

Q. Did he return after the strike? [2708]

A. I don't recall if he did, and I don't recall that he did not. I have no definite recollection regarding Grant.

Q. What was his job prior to the strike, if you recall?

A. He was a relatively new employee, and would have been either a laborer or a roustabout.

Q. Do you know a Mr. Shelton, who did not return after the strike? A. I know Mr. Shelton.

Q. What was his job?

A. Again, he was one of the newer employees, and was probably either a laborer or a roustabout.

Q. Do you have any recollection of what jobs these men actually had?

A. No, sir. There are too many employees for me to identify a particular man in a particular job where there are new employees. The older men that I know better I would know.

Q. Do you recall any of the older men that did not return after the strike?

A. No, sir, I don't recall any of the older men that did not return.

Q. Do you know any of the men who did not return other than the three I have mentioned?

A. Yes, there was one other that I recall.

Q. What is his name? [2709] A. Perkins.

Q. Perkins? A. Yes, sir.

Q. What is his job?

A. I think he was a roustabout.

Q. At the time you talked to Cody on the 16th

(Testimony of Elmer L. Dreyer.)

of November, had people been hired to fill those vacancies left by the strikers who had not returned, if you know?

A. I don't know definitely, but I will say in all probability there had been.

Q. There had not been?

A. I say, in all probability there had been.

Q. Your records, of course, would show any hiring between the 4th of November, the settlement day, and the 16th of November, would they not?

A. That is correct.

Q. Were those jobs filled by new men or transfers from other Texas Company operations, if you recall?

A. If they were filled, they were filled by new men.

Q. And subsequent to November 16th, to your knowledge, have people been hired in any of the classifications under your jurisdiction?

A. Yes, people have been hired as laborers.

Q. Hired in any other capacity?

A. Under my jurisdiction in The Texas Company? [2710]

Q. Yes. A. No.

Q. Hired in at the bottom job, in other words?

A. That is correct.

Trial Examiner Scharnikow: That is roustabout?

The Witness: No, sir. The bottom job is laborer.

Q. (By Mr. Hacker): Subsequent to November 16th, did any vacancies arise in classifications higher than roustabout which were filled by promotions,

(Testimony of Elmer L. Dreyer.)

thereby making way for the hiring of laborers or roustabouts? A. Yes, sir.

Q. In what classifications?

A. Between November 16, 1948, and today, there have been vacancies in the gaugers' classifications, have been vacancies in the pumper No. 1 classification, and each of those vacancies makes a vacancy in the lower classifications, because by promotion men go up the ladder in seniority.

Q. Do you have any judgment as to the earliest of those vacancies occurring after November 16th?

A. The earliest permanent vacancy that I think of occurred about February, 1949.

Q. After February 1, 1949?

A. I think it was on February 1, 1949, the first one I think of.

Q. What was that vacancy? [2711]

A. That was a vacancy in the line rider classification.

Q. And that was filled by promotion?

A. That was.

Q. And subsequently a laborer or roustabout was filled by reason of the promotion, I take it?

A. We don't always hire a new man on the bottom to fill a vacancy at the top. The number of employees we use is flexible and we might hire several laborers to take care of the work at the bottom when there were no vacancies at the top, and likewise there might be vacancies at the top and because the work was completed at the bottom, we don't hire anybody. So

(Testimony of Elmer L. Dreyer.)

top vacancies do not always mean hiring at the bottom.

Q. Have any new men been hired since February 1st in any classification? A. Yes.

Q. February 1st of this year, you understand?

A. That is right, yes.

Q. I think you mentioned a roustabout and laborer.

A. I think they have all been hired as laborers.

Q. Under the terms of your contract, vacancies above that rate were subject to the provisions of the contract with reference to employees being upgraded, current employees being upgraded to take such vacancies. Is that right?

A. That is correct. [2712]

Q. You testified concerning the occasion on September 28th, when you discharged Cody. I am not clear on how you happened to be present at that time. Would you just state that in the record, please?

A. At the time of that meeting Cody was in Mr. Jones' office, the office door was open, it was about noontime. I was leaving my office, walking through the hall, and I looked in and I saw Cody and Jones in the office and I went in.

* * * * *

Q. At the time of your November 8th meeting with Mr. Cody, to your knowledge, were there still some pickets at any of the production operations of the company?

A. At the time of that November 8th meeting,

(Testimony of Elmer L. Dreyer.)

it was my understanding that there were still pickets at gasoline Plant 5.

Q. To your knowledge, that was the only place there were pickets, isn't that true?

A. That is the only place that I thought there were any pickets left at that time.

Q. That is the gasoline Plant 5?

A. That is correct.

Q. At the time of your meeting with Mr. Cody—between November 4th, the settlement date, and November 8th, when you [2713] met with Mr. Cody, had you or any persons under your supervision in fact sent any pipe line employees across that picket line into the gasoline plant to gauge or sample or do any other work? A. Not to my knowledge.

Q. Had you received instructions from Mr. O'Connor not to send the returning pipe line employees across that picket line? A. I had not.

Q. Had you received any instructions from anyone? A. I had not.

Q. Had you discussed it with anyone?

A. I had not.

Q. Anyone in management?

A. I had not. [2714]

* * * * *

Q. After the settlement of November 4th and after you were aware that a picket line persisted at the gasoline plant, did the subject of making a decision as to whether to send your men across that picket line arise at all to your knowledge?

A. No, sir.

(Testimony of Elmer L. Dreyer.)

Q. Did it come to your attention any of your employees had [2715] been asked to cross it and refused?

A. No supervisory employee except Cody ever refused to cross any picket line.

Q. The subject just didn't come up, is that your testimony?

A. In regard to the picket line at Plant 5?

Q. Yes. A. That is correct. [2716]

* * * * *

Redirect Examination

Q. (By Mr. Brooks): In this November 8th conversation did you ask Cody to go to Plant 5 or did you ask him whether he would go if he were required?

A. I said to Cody, would he go through the picket line at Plant 5 if I should so instruct him to.

Q. What did he say?

A. He said that it would be unfair for me to ask him to do that, said he would not do it, that I should ask somebody else to do it. [2719]

* * * * *

Q. Referring to Respondent's Exhibit No. 15, which is the flow chart now, while an oil well is pumping, where is the oil going?

A. The oil from the well while it is pumping usually goes into a lease shipping tank.

Q. At that point the oil is either stored for a period of time or at some time thereafter it is pumped out of the tank into the pipe lines, is that correct?

A. That is generally correct. There are occasions

(Testimony of Elmer L. Dreyer.)

when the oil may go through another tank before it gets to the lease shipping tank in order to facilitate the withdrawal of water, but for practical consideration it goes into the lease shipping tank. [2720]

* * * * *

Q. The pipe line division may be moving oil then, I take it, from the tanks, the lease shipping tanks, on occasions when wells are not pumping, is that right? A. That is correct.

Q. Then wells might pump on occasions when the pipe line division is not removing oil, is that correct?

A. That is correct.

Trial Examiner Scharnikow: Would the pipe line division be removing oil from a lease shipping tank into the gathering line, for example, taking it into the gathering line when the well would be pumping into that tank?

The Witness: No, sir, the pipe line would not move oil from a lease shipping tank into the pipe line at the same time that the well was producing into that tank. There are usually—I might say that on Exhibit 15 only one lease shipping tank is indicated. There are usually at least two shipping tanks in a group [2721] or battery, so that the well or wells may produce in the one tank while shipment is made from another tank.

Trial Examiner Scharnikow: So that an observation by any of your men of the type that is repeatedly made in Respondent's Exhibits 23 and 24 that wells were pumping, would not be an indication one way or another that at the same time you were

(Testimony of Elmer L. Dreyer.)

taking into your gathering line oil from one tank served by that well?

The Witness: It is not a positive indication, sir.

Trial Examiner Scharnikow: Does it indicate a likelihood one way or the other?

The Witness: When it is repeatedly reported that the wells are pumping, it is, I think, a safe presumption that the tanks will fill and must be shipped out from time to time to make room for the wells to pump into. If wells are pumping only on one occasion and were shut down shortly thereafter, it might indicate that the lease tanks were full, but when wells are reported pumping day after day it means that the oil had to be moved out of the way to make room for it.

Q. (By Mr. Brooks): To clarify the question regarding the dates on the left-hand column of Respondent's Exhibit 16, that date indicates what?

A. That is the date shown on the run ticket and indicates the date on which the shipment was—the tank was gauged and presumably the shipment was started. [2722]

Q. That is the date that the shipment through the pipe line facilities started?

A. That is correct.

Q. It has nothing to do then with whether wells were pumping on that particular day on that particular lease.

A. That is correct.

Q. Is a valve sealed at any time while it is open, or is it only sealed while closed?

A. I know of no instances that we seal the valves

(Testimony of Elmer L. Dreyer.)

open. We always seal them in the closed position.

* * * * *

[2723]

Recross-Examination

Q. (By Mr. Hacker): Well, are you familiar with the Oakley Lease? A. Yes, sir.

Q. In what field is it located?

A. That is in the Torrance field.

Q. According to Respondent's Exhibit No. 16, it does not show any movement of oil from the Oakley Lease on that chart. I will ask you to look at it.

A. No, sir, there is no movement from the Oakley Lease.

* * * * *

Q. Now, you testified that oil is normally pumped into these [2728] lease shipping tanks. Isn't it a fact that in more than one instance it first goes into settling tanks?

A. Yes. I referred to that by stating that in many instances, or in some instances, it goes through other tanks to facilitate the drawing of water before it goes into the shipping tanks.

Q. And the settling tanks are two tanks, one on top of another, are they not?

A. I would say it was just one tall tank.

Q. The purpose there is to let the nonusable portion of it settle, I take it? A. That is correct.

Q. And while it is in the settling tanks it remains there for a period of time to permit that settling to take place?

A. The oil and water goes into the settling tanks

(Testimony of Elmer L. Dreyer.)

and the oil leaves the top of the settling tank simultaneously. That is a continuous operation.

Q. So that the bottom of that tank merely holds the unusable, the water, is that right?

A. That is right, and the water may be bled off or withdrawn continuously.

Q. Now, you testified, in response to a question of the Trial Examiner, that if one observed the wells pumping over a period of time, that person would normally infer that the tanks would become full at some time and the material moved from them through the gathering system. Do you recall that testimony?

A. I do.

Q. Of course, that would depend on the amount of flow from the well, would it not, as to how rapidly you fill the tanks?

A. That is correct.

Q. Isn't it a fact that some of your wells will not fill the average size tank in a month of pumping?

A. We have some wells that would not fill the tank in a month's pumping, yes.

* * * * *

Q. So that it actually varies according to the amount of oil a particular well is putting out?

A. That is correct.

Q. And there are others that might be filled in 48 hours, I take it?

A. Or less. [2730]

* * * * *

Q. (By Mr. Hackler): Prior to the occasion on September 28th, when you asked Cody to do gauging and sampling, had you or, so far as you know, anyone under your supervision asked him to do that type

(Testimony of Elmer L. Dreyer.)

of work from the time of the strike up to that date?

A. On that same date Mr. Jones asked him to do that same work that I had asked him to do.

Q. Prior to that date do you know of any occasion when he [2732] had been asked to do that type of work?

A. Not to my own knowledge, no, sir, I do not.

Q. He had not been scheduled to do any of that type of work, had he, prior to that time?

A. He had not. [2733]

* * * * *

FIELDER A. JONES,

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Avery): Will you give the reporter your name and address, please?

A. Fielder A. Jones, 3 Middle Ridge Lane North, Rolling Hills, California.

Q. What is your position with The Texas Company, Mr. Jones?

A. Assistant superintendent, pipe line division.

Q. How long have you held that position?

A. Since 1937.

Q. Did you have a meeting with the Workmen's Committee in the pipe line division on September 3, 1948?

A. I did.

Q. Who arranged the meeting, if you remember?

A. The afternoon of September 3rd negotiations were going on in the Los Angeles office. Up there at that meeting, I was at that meeting, and Mr. Bean,

(Testimony of Fielder A. Jones.)

who was chairman of the Workmen's Committee, was at that meeting, also. That meeting was continued on until midnight. However, it took a recess around supper time, and it was apparent that there would be no possibility—or change that, it appeared that there might possibly be a strike at midnight.

I spoke to Mr. Bean and made arrangements to have a meeting [2734] at 11:00 o'clock at night at my office, in case there was not a settlement before that time.

Q. Did you meet?

A. We did meet at 11:00 p.m. in my office.

Q. Who was present?

A. Mr. Bean and Clarence Gunning representing the Workmen's Committee; management was J. R. Letson, J. C. Wilson, and myself.

Q. And will you tell us what the discussion was about and who said what, as you remember?

A. I believe I opened the meeting and said that there had been discussion in the afternoon in case the Oil Workers went out on strike it would be necessary that we have an orderly shutdown, or they were discussing shutdowns. So we told the Workmen's Committee it would be necessary to keep some of the fields operating longer than others, some of the gaugers would probably have to stay on the following day, until such time as the shipments were out and the oil was into the various pump stations, and that the operators at pump stations would stay on duty until this oil was in.

Mr. Bean said this would be entirely satisfactory.

(Testimony of Fielder A. Jones.)

Q. Were there any other subjects discussed at that meeting?

A. Yes; after the discussion of the shutdown, there was discussion on issuing of passes to people outside the bargaining unit. I told Mr. Bean that I thought the passes should be [2735] issued to all members who were outside the bargaining unit, that is, supervisory forces and office help.

Mr. Gunning did most of the talking for the Workmen's Committee when discussing the passes. Mr. Gunning said that they didn't feel as if they could issue passes to everybody that was not covered by the bargaining unit. He said that they would just issue passes for the maintaining the department in shutdown condition; in case of any operating that they would pick up the passes that they issued.

He stated that they didn't want to put out too many passes, said it was bad morale for the picket line if there were too many passes out, and he also indicated that he didn't see why some of the office people should have passes and go in and work when there were so many people who were going to be outside the picket line and wouldn't be able to work during that period.

Q. Were passes refused anybody at that meeting?

A. Yes, at that meeting—maybe I had better clear this up, if I might. These were just temporary passes that were discussed at this particular meeting. They didn't have any regular passes made up. At this meeting passes were refused to clerical help. We had two junior engineers that did not get passes, two

(Testimony of Fielder A. Jones.)

telephone repairmen that didn't receive passes. George Cody didn't receive a pass, because he was on vacation.

Q. Do you remember any other discussion at that meeting?

A. That was the principal part of the discussion. I told Mr. [2736] Gunning that I still felt that management should have—I say management, I mean people outside the bargaining unit—anyone who was in the bargaining unit should have a pass to get through the picket line as easily as possible. It was my understanding that anyone outside the bargaining unit had a perfect legal right to come through the picket line, and I think they should all have a pass so they could come in and not have a disturbance on the picket line trying to get through, which I thought would happen if they didn't have a pass.

Q. Do you remember anything else being said about passes at that meeting, Mr. Jones?

A. That is my full recollection at this time.

Q. When did you next meet with the Workmen's Committee?

A. The next meeting was on the morning of September 6th.

Q. Who called that meeting, Mr. Jones, if you remember?

A. I called the meeting.

Q. And who was present?

A. For the Workmen's Committee H. S. Bean, Delbert Clayton and C. T. Rednour.

For management J. R. Letson and myself, J. C. Wilson. The secretary also attended the meeting.

(Testimony of Fielder A. Jones.)

Q. Then will you relate the conversation at that meeting as best you can?

A. I told the Workmen's Committee that I still felt that passes should be issued to all the people in the department [2737] who were outside of the bargaining unit. I had a list and checked over this list of everyone that was out of the bargaining unit. The Workmen's Committee, Mr. Bean, stated that they still felt the same as they had in the previous meeting on September 3rd. They did not believe that passes were necessary for all the people for which I requested, and to keep up the morale of the picket line they would only issue passes to a certain percentage of the group which I had requested.

* * * * *

Q. (By Mr. Avery): Anything else said at that meeting, Mr. Jones?

A. Mr. Bean or Mr. Clayton stated that the passes given would be for operating—not be given for operating work, and in case any operations were started, why, the union would pick up the passes that they had issued.

Q. Do you remember anything else said about passes at that meeting?

A. No, sir, I think that covers it. [2738]

* * * * *

Trial Examiner Scharnikow: Did you agree to any statement made by anybody at the meeting there would be no movement of oil?

The Witness: No, sir.

Q. (By Mr. Avery): Did you make any state-

(Testimony of Fielder A. Jones.)

ment that pass-holders would do no productive work?

A. No, sir. [2740]

* * * * *

Trial Examiner Scharnikow: I will sustain the objection.

Did anyone make the statement that no productive work would be done?

The Witness: The union committee, Workmen's Committee, stated they were giving the passes to maintain the department in a shutdown condition; if any operating work was performed, they would pick up the passes.

Trial Examiner Scharnikow: What answer or comment did you make to that?

The Witness: I made no comment whatsoever. We told them that we desired the passes because we considered that all the people not covered by the bargaining unit were legally entitled to them.

Q. (By Mr. Avery): Mr. Jones, did you have a telephone conversation with Mr. Cody on or about September 8th or 9th, 1948?

A. That is correct.

Q. Did you call Mr. Cody or did he call you?

A. Mr. Cody called me.

Q. Will you relate that conversation as best you can?

A. Mr. Cody called me September 8th or 9th, I think it was Thursday or Friday of the week preceding when he was supposed to report back to work from his vacation. He called in and said he was returning from his vacation, was ready to go to work.

(Testimony of Fielder A. Jones.)

I told him that there was a strike on, I was glad that he called because his schedule would be different than it normally would be. I told him we had a special schedule for him.

His car was in the refinery, where he had left it, and we also had a pass for him to go through the picket line. George said that he didn't want to come in and pick up his car and pick up his pass, because he didn't want to come through the picket line at the refinery without a pass.

I told George that we would deliver the pass and his schedule to his house and would deliver the car out to the Los Alamitos headquarters and he could pick it up out there.

George asked what type of work he would be doing and I told him that we were running a 24-hour patrol and he would relieve one of the men on that patrol when he reported to work and continue the patrol work. I stated briefly we were checking the pipe lines and the tank farms, that he could get the details from the man that he relieved when he reported to work.

Cody indicated he would report to work according to schedule——

Q. Tell us what Cody said, as you remember it, Mr. Jones.

A. Cody said that he would report to work at the time mentioned in his schedule when he received the schedule. He hadn't received it at that time. [2742]

* * * * *

Q. Mr. Jones, do you know whether anyone who

(Testimony of Fielder A. Jones.)

didn't have a pass during the strike reported for work, anyone under your supervision?

A. Yes, I do.

Q. Could you give us the names of those people who did, or the persons? A. B. W. Hammer.

Q. What kind of work did he do for the company?

A. He worked in the office.

Q. Anyone else?

A. P. T. G. Biery. I am not sure of that third initial.

Q. What was his job?

A. He was an office worker.

Q. Anyone else? A. M. Ratkay.

Q. What was his job?

A. He was an office worker, and also had done relief oil dispatching.

Q. Anyone else that you recall? [2743]

A. J. M. Dent.

Q. What was his job?

A. He was a material clerk.

Q. Anyone else? A. J. R. Letson.

Q. What was his position?

A. District foreman.

Q. Anyone else? A. E. M. Mistern.

Q. What was his job?

A. Well, it is the other sex, works in the office.

Q. Her job. Anyone else?

A. W. B. Skinner.

Q. And his job? A. Oil clerk.

Q. Anyone else? A. L. M. Reichenbach.

Q. What was his job? A. Field gauger.

(Testimony of Fielder A. Jones.)

Q. Were there any more?

A. I have a lot more, yes.

Q. Well, I want to limit this. All these people whom you have named, did they go through the picket line prior to September 28th?

A. No, sir, the last one mentioned did not. [2744]

Q. Did not. He went through after September 28th, I take it?

A. That is correct.

Mr. Avery: That is all I have, Mr. Examiner.

Trial Examiner Scharnikow: May I interrupt just a second on this?

How do you know these people did not have passes?

The Witness: I know they did not have passes because they were not issued passes at the meeting on September 6th held in my office with the union representatives, would not give passes to those people except one of the instances, J. R. Letson. He was issued a pass at that time.

Trial Examiner Scharnikow: He was issued a pass?

The Witness: That is correct. His pass was picked up by the union previous to September 28th and destroyed.

Trial Examiner Scharnikow: What do you know about it being picked up?

The Witness: I just have the word of Mr. Letson.

Trial Examiner Scharnikow: Did you ask for passes for all these people whom you have just mentioned?

The Witness: Yes, sir, I did.

(Testimony of Fielder A. Jones.)

Trial Examiner Scharnikow: That was on September 6th?

The Witness: Both on September 3rd and September 6th.

Trial Examiner Scharnikow: Were the passes given to you for the other people?

The Witness: Not in all instances, no, sir. [2745]

Trial Examiner Scharnikow: Was there a definite refusal—strike that. Did someone for the union on September 3rd and September 6th say definitely that passes would not be given to these people, excluding Letson?

The Witness: That is correct.

Trial Examiner Scharnikow: You made a request for such a pass in the case of Reichenbach?

The Witness: No, sir, Reichenbach, I understood he was stricken from that list, because he came up after September 28th. I think he should be.

Trial Examiner Scharnikow: Did you make a request for a pass for Reichenbach on September 3rd and September 6th?

The Witness: No, sir.

Trial Examiner Scharnikow: But in the case of all these other men you did, and the girl?

The Witness: Yes, sir. [2746]

* * * * *

Cross Examination

Q. (By Mr. Hackler): Now, you mentioned that you were in Los Angeles in the home office up until some time in the evening of September 3rd. Do you recall that testimony? A. Yes, sir.

(Testimony of Fielder A. Jones.)

Q. And that you remained in the Los Angeles office until some time in the evening? [2753]

A. In the late afternoon.

Q. And then you made arrangements for a meeting at 11:00 o'clock that night with the Workmen's Committee, is that right? Let me put it this way—

A. Bean and I got together at that meeting and decided to have a meeting in my office at 11:00 o'clock that night.

Q. I see. Bean had been at the same meeting you were at in Los Angeles?

A. That is correct.

Q. The meeting at 11:00 was at your office at Signal Hill?

A. Wilmington.

Q. Wilmington; your office is in Wilmington, is that right?

A. Yes, sir.

Q. Had you been in a meeting the day before, September 2nd, in the Los Angeles office?

A. My recollection is there was a meeting the afternoon of the previous day.

Q. Those were bargaining meetings, weren't they?

A. That is correct.

Q. Were substantially the same people present at the September 2nd and September 3rd meetings in Los Angeles? Let me rephrase that. I don't want to go very much into this, but to establish the facts of the meeting. Let me ask you if at the September 2nd and 3rd meetings in Los Angeles there were representatives of the Union and representatives of the [2754] management there, not only the pipe line but also the other refining departments.

(Testimony of Wallace E. Avery.)

A. Wallace E. Avery, 1524 North Pacific, Glendale.

Q. What is your present employment and position?

A. Attorney for The Texas Company.

Q. Located in Los Angeles?

A. Yes, 929 South Broadway.

Q. Were you occupying that position in 1948, Mr. Avery? A. I was. [2774]

Q. There is in the evidence here as General Counsel's Exhibit No. 13 a strike settlement agreement, which I show you. I will ask you if some time in early November you had a meeting with any representatives of the Union concerning the matter of putting into effect or carrying out any portion of that settlement? A. Yes, I did.

Q. When? A. On November 3rd.

Q. Where?

A. At our offices in Los Angeles.

Q. Will you tell us about that meeting, telling first who was present, and then describe the meeting, the conversations?

A. Mr. Mattern, Carl Mattern, Mr. Lindsay Waldon——

Q. Who is Mr. Waldon?

A. Mr. Waldon is general counsel for the Oil Workers International Union; Mr. Mattern is a district director, I so understood; Mr. George Whitney, who is an attorney of the firm of Gibson, Dunn and Crutcher, and myself met to consider action necessary to put Paragraph 5 of the Strike Settlement

(Testimony of Wallace E. Avery.)

Agreement into effect. That paragraph has to do with the agreement on the part of the refining department not to prosecute the civil action, and the agreement on the part of the Union not to prosecute the unfair labor practice charges. [2775]

* * * * *

Q. When was this last phone call, Mr. Avery?

A. I believe it was around noon on the 18th, I think. Yes, I think that was the date. And I told either Mr. Brown or Mr. Waldon that we would draw up the necessary papers dismissing the lawsuit and withdrawing the unfair labor practice charge, and that we would be over later that afternoon.

Q. Did you go over that afternoon?

A. Yes.

Q. Where did you go?

A. Mr. Whitney had drawn up the stipulation dismissing the lawsuit. I drew up the request for withdrawal. [2785]

Q. Is the stipulation the one which is attached to the motion to dismiss which was filed earlier in this proceeding and was attached to that motion as the Appendix C?

A. That is true.

Q. Did you see Mr. Brown or Mr. Waldon or both that day?

A. I did.

Q. Where?

A. At the Alexandria Hotel. Mr. Whitney and I, with these two documents, went to the Alexandria Hotel.

Q. What was the other document?

A. The withdrawal request.

(Testimony of Wallace E. Avery.)

Q. Is that the—— A. It is.

Q. ——withdrawal request which is Appendix B?

A. That is right.

Q. Go ahead. [2786]

A. Mr. Whitney handed the stipulation to Mr. Waldon, and I handed the withdrawal request to Mr. Brown. Before, however, Mr. Brown signed the withdrawal request, I told him that he had placed me in a very peculiar position; that I had been the union's advocate with my people, and that they were not at all satisfied that the union would keep its word and not file new charges. They had been concerned, I told Mr. Brown, that they felt that since the union had struck the company without doing very much negotiating, that they might likewise turn around and not keep their word and file new charges, and that I had been placed in a rather embarrassing position and that if Mr. Brown, if the union did not keep its word, that I would be—that I would in effect be double-crossed.

Mr. Brown stated this, that he could not prevent an individual striker from filing a charge, and I agreed that he could not, but he did say that the union, that I could depend on the union not encouraging or filing any new charges.

In that same conversation Mr. Brown mentioned Mr. Cody and said that Mr. Cody might file a charge, because he felt that when he was asked to do productive work that the company had in fact demoted him, and that it was possible that Mr. Cody would file such a charge, but the union would have nothing

(Testimony of Wallace E. Avery.)

to do with it. Mr. Brown then signed the withdrawal request and Mr. Waldon and Mr. Whitney executed the stipulation.

* * * * *

Cross Examination

Q. (By Mr. Hackler): Mr. Avery, in this meeting on the 3rd day of November, the first meeting you testified to, had the parties at that time agreed on the terms except for the drafting the document which became the written strike settlement agreement in the refining department?

A. My recollection is, Mr. Hackler, that that document had already been drafted.

Q. By "that document," you are referring to the November 4th written strike settlement agreement signed by O'Connor, Mattern and Mr. Myers?

A. General Counsel's Exhibit No. 13.

Q. General Counsel's 13? A. Yes, sir.

Q. That had been drafted and approved by yourself and the attorneys for the union?

A. Well, I don't know about the attorneys for the union, Mr. Hackler. I know it had been approved by our legal department, by myself and, I believe, by Mr. McNair.

Q. I believe you testified that Mattern, Waldon and George Whitney were present with yourself at that meeting? A. Yes, sir.

Q. And that the purpose of that meeting was to discuss what documents it would be necessary to draw in connection with the last paragraph of that written strike settlement [2790] agreement?

(Testimony of Wallace E. Avery.)

A. That is true.

Q. The parties at that time knew this settlement agreement was going into effect as soon as it was signed, I take it?

A. Well, no, it wasn't quite that way, Mr. Hacker. I believe that on the 3rd the union was to have a membership meeting, at which the strike settlement agreement would be ratified. I am not too clear on that, but I believe that was the case.

Q. Let me ask you if the strike settlement agreement had been reduced to typewritten form by that time? A. Yes, it had.

Q. Had it been examined and approved by Matern or other union representatives, so far as they were concerned, subject perhaps to the ratification of the membership? A. I believe it had.

Q. When you met with them, were they aware of the contents of the document?

A. Yes, sir, they were. [2791]

* * * * *

Q. By the terms of Paragraph 5 of this agreement, which is General Counsel's Exhibit 13, it states that the refining department will not prosecute the pending law suit heretofore filed against the union or its members, or institute any new [2792] law suits for any alleged damage to the refining department or its employees arising out of the current strike. You note that? A. I see that.

Q. Do you know who drafted this document?

A. I believe that was a joint effort.

(Testimony of Wallace E. Avery.)

Q. Did you participate in the joint drafting of it? A. Yes, I did.

Q. Was it the purpose of that section, the portion I just read, to bring about the dismissal of not only the damage suit but also the injunction action, insofar as it applied to the refining department?

A. Both.

Q. Both? A. Both, that is right.

Q. In other words, the carrying of that out would entail the refining department being completely out of the law suit? A. That is true.

Q. Is that right? A. That is right.

Q. Both as to claims for damages or injunction, is that right? A. That is true.

Q. When did the pickets leave? When did they cease picketing in the refining department? After the signing of this document?

A. This is hearsay, what I am going to give you. I believe [2793] that picketing was discontinued as to the refining department properties on the 5th of November.

Q. The day after this settlement was signed.

A. The day after this was signed.

Q. As a matter of fact, the settlement provides that the people be scheduled back to work as soon as it was signed, does it not? A. Yes. [2794]

* * * * *

Q. You understand my question has to do with your claim for [2798] money damages, and isn't it a fact that the claim you had urged in the law suit and the only one of which you were aware at that time

(Testimony of Wallace E. Avery.)

was a claim that the company through its inability to operate its properties because of the strike had suffered by way of drainage, loss of profits, and so forth?

A. I would still not agree just because of the strike. If you will say that because of mass picketing and so on, I will agree with you.

Q. Assume mass picketing was one of the causes, so far as the Complaint is concerned, that you were unable to operate your properties, would your answer be that still your claim for damage was bot-tomed on loss of profits and other money losses, due to your inability to operate your property?

A. Yes, there was no destruction of property.

Q. That is what I am getting at. There was no claim in the Complaint, or at the time you were meet-ing with these people on the 3rd were you aware of any claim by the company against any of the pro-duction strikers for having inflicted damage, physi-cal damage, to your properties?

A. By destruction?

Q. Yes. A. That is true. [2799]

* * * * *

Q. Was there any discussion between yourself and either of us with reference to how many de-partments or separate bargaining units were in ex-istence at The Texas Company?

A. I don't believe so, except this, Mr. Hackler, that I think I told you there were three producing department units which were not included in a formal strike settlement agreement.

(Testimony of Wallace E. Avery.)

Q. What was the date of this meeting, November 19th? A. Yes.

Q. The withdrawal request was in your presence signed by me, was it not? A. Yes.

Q. And a copy given to you? [2824]

A. Yes, several copies.

Q. After my telephone conversation with Mr. Brown? A. That is right.

* * * * *

Q. The settlement agreement in the refinery was not produced or a copy shown or delivered, was it?

A. I had it in my possession, but I don't think we looked at it.

Q. It wasn't brought out at all, was it?

A. I don't think so. I don't recall that it was. Our conversation was quite short, according to my recollection. [2825]

* * * * *

Q. (By Mr. Hackler): Mr. Avery, I hand you a document marked for identification as General Counsel's Exhibit No. 49 and ask you if that is your signature on that letter? A. It is.

Q. This appears to be a letter of March 30th, addressed to [2826] Mr. Martin Zimring. You know he is a Field Examiner who was investigating this case at that time? A. Yes.

Q. You say, "In accordance with your request, we are enclosing a copy of the strike settlement agreement dated November 4, 1948, and entered into between the refining department of The Texas Company and the Oil Workers International Union."

(Testimony of Wallace E. Avery.)

Do you know how that request was made by him, whether in writing or orally?

A. I believe that was made orally. That is my recollection.

* * * * *

Q. And you attached to this letter a copy of the November 4th strike settlement? [2827]

A. That is right.

Q. Isn't it a fact that until this letter was sent on March 30, 1949, you had not—to your knowledge, the Labor Board had not been supplied with a copy of that strike settlement agreement?

A. To my knowledge, the Board had not been.

* * * * *

[2828]

Q. (By Mr. Hackler): I hand you a document marked for identification as General Counsel's Exhibit 52 and ask you if that is a letter that you wrote addressed to the attention of Mr. Zimring, bearing your signature, which is a reply to a letter you received enclosing a copy of the charge filed by George Cody?

A. Yes, it is. [2840]

Q. So that I am clear, you mentioned that you did not file any documents to dismiss. I note that this letter does say on March 2, 1949, "We respectfully request the Regional Director to dismiss this charge."

A. Yes. I had reference to formal motions.

Q. Yes, that is what I had reference to.

I will ask you to examine this General Counsel's Exhibit No. 52, of March 2nd, and if that letter was not in reply to a letter which accompanied your copy

(Testimony of Wallace E. Avery.)

of the Cody charge and invited a statement of position with reference to Cody's case.

A. My recollection is that that is a fact, that this is in response to your form letter asking for a statement of my position.

Q. Of your position. I will ask you if in your letter you made any reference to a settlement agreement as being binding upon or as being a cause for dismissing and disposing of Cody's case?

A. I did not.

Q. As stated in the letter, you simply said that he was discharged as a supervisor, because he refused to perform duties assigned to him, namely, securing gauges and tank temperatures and samples at the Yorba Linda station.

A. That is right. [2841]

* * * * *

ALFRED GEORGE CODY

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Hackler): Mr. Cody, you have previously been sworn as a witness in this matter?

A. Yes, sir.

Q. You are the same George Cody who testified earlier?

A. Yes, sir.

Trial Examiner Scharnikow: Alfred George Cody.

The Witness: Yes, sir.

Q. (By Mr. Hackler): You recall in your direct testimony that you mentioned some black books in

(Testimony of Alfred George Cody.)

which you made entries as you were riding the lines while you were working during the strike?

A. Yes, sir.

Q. I think you were present here in the courtroom when the two black books were produced and typewritten copies of them were placed into evidence as Respondent's Exhibits 23 and 24?

A. Yes, sir.

Q. Now, Mr. Cody, in your direct examination, your examination [3089] in chief, you testified that you could only recall two occasions on which you had actual knowledge that oil or petroleum products were moving through the pipe lines.

With respect to those two occasions, what did you have reference to?

A. I had reference to the time that I heard the oil coming in at Los Alamitos, and at that time the only other one I could recollect was the one at the Elliot lease in Huntington Beach.

Q. Now, with reference to oil moving through the pipe lines, did you have reference to any particular pipe lines in your testimony?

A. Yes, through our pipe lines.

Q. By "our pipe lines," what do you mean?

A. Why, the ones owned by The Texas Company.

Q. Are there pipe lines that are under the control and operation of the production department?

A. Yes.

Q. I will put it this way: Are there pipe lines in

(Testimony of Alfred George Cody.)

the system that the movement of oil is handled by production people through those pipes?

A. From the oil to the line, yes.

Q. From the oil to the lease shipping tank?

A. From the oil well to the lease shipping tank.

Q. On those two occasions that you had reference to, did you [3090] include in the two occasions that type of movement? A. No.

Q. Did you have reference to movements which the pipe line division would normally handle?

A. Yes, sir.

Q. Since Respondent's Exhibits 23 and 24 have been received into evidence, did you at my request examine all of the entries in those, in the log books that bear your name? A. Yes, sir.

Q. In other words, the entries made by you.

A. Yes, sir.

Q. After examining them, did you find anything that refreshed your recollection with reference to the pipe line shipments that directly came to your attention? A. Yes, I did.

Q. What did you determine in that respect?

A. I determined that in the notes that I wrote into the book that I had notified the company that there was a movement of oil at the Yarnell lease, Yorba Linda.

Q. Was that in addition to the two occasions which you have testified to? A. Yes, sir.

* * * * *

[3091]

Q. (By Mr. Hackler): Will you check the exhibit which is Respondent's Exhibit 24, at page 10, the

(Testimony of Alfred George Cody.)

entry which begins at the bottom of the page and contains your signature on the following page, and see if that is the one that you had reference to in your testimony? A. Yes, it is.

Q. That is page 10 of Respondent's Exhibit No. 24, an entry of September. Is that the one to which you had reference? A. Yes.

Q. It was your testimony here that Yorba Linda is used as a pump station for the Richfield field?

A. That is right.

Q. With reference to the entries appearing on that date, what portion of the entry made by you that date are you referring to as a report of operations of the pipe line division?

A. On page 10, the third paragraph.

Q. The part that begins, "Went to Yorba Linda via pipe line"? [3092] A. Yes, sir.

Q. Can you tell us in your own words what happened on that occasion? A. Yes, sir, I can.

Q. All right, what did happen?

A. I drove up to check the Yorba Linda pump station and noted that Mr. Letson and Mr. Hopkins were standing on the bank above the tanks at the Yarnell lease, and I also noted that the pipe line pump was running.

I asked Mr. Letson what was going on. He said he didn't know.

I also noted the other notes that I showed, that the tank suction was open on a tank at that lease and another one was closed and the seals were broken.

Q. Now, the entry indicates, says a stream was

(Testimony of Alfred George Cody.)

going into Tank 10006. Was that a pipe line tank?

A. Yes, sir, that is a storage tank at the Yorba Linda pump station.

Q. A pipe line storage tank? A. Yes, sir.

Q. Not a lease shipping tank? A. No, sir.

Q. Was it in connection with the movement of oil into that tank that you questioned Letson, or some other movement?

A. It was the line being open into that tank and the note [3093] that the pipe line pump was running at the Yarnell lease that I made that note.

Q. You say "the pipe line pump." Do you say that in distinction to some other type of pump?

A. Yes.

* * * * *

Q. I believe it was your testimony you did look over the other entries in the book that bears your signature and that you found no other occasions other than the one in Yorba Linda and the two you mentioned in your testimony, namely, Huntington Beach and Los Alamitos, where you actually observed oil movements in the pipe line system under your supervision. Is that right?

A. That is right, as I understood them. [3094]

Q. You heard a good deal of testimony here, did you not, with reference to entries made by yourself to the effect that wells were pumping and wells were operating at various times. You heard that testimony? A. Yes, sir.

Q. You observe a number of statements over

(Testimony of Alfred George Cody.)

your signature where notations of that kind are made, do you not? A. Yes, sir.

Q. Did those notations at the time you made them have reference to an observation on your part that oil was moving in the pipe line under your jurisdiction? A. No, sir.

Q. Was it your understanding that at least during the strike you were to report matters of that kind, matters that would normally come under production operation as distinct from pipe line operation?

A. Yes, especially the operations of the field. I mean by that, I was to note what wells were on and which ones were off, and I tried to do that.

Q. It was your understanding that the company wanted that information? A. Yes, sir. [3095]

* * * * *

Q. (By Mr. Hackler): Was this type of book-reporting used before the strike? A. No, sir.

Q. So that the books came into existence just at the time of the strike, as far as you know?

A. Came to my knowledge when I came back to work on the 13th of September.

Q. I believe you said the person who turned the book over to you told you the type of thing that the company was interested in. A. That is right.

Q. And by "interested in" I mean for the purpose of making any entries in the book, is that correct? A. That is right.

Q. Now, in the observations made, or statements made by you in various places "Wells pumping," the

(Testimony of Alfred George Cody.)

number of wells pumping, and "All wells pumping," on a given lease, what would be the basis of that? Would it be just the observation of movement of the pump, or that you had actually gone out and inspected it?

A. Just the operation of the pump in motion.

Q. You were in an automobile as you drove by?

A. Yes, sir.

Q. Did you get out of the automobile in each of those instances when the entry at a given lease was made?

A. No, sir; only in the cases when I observed that seals were broken, and that was on our lines.

Q. Inviting your attention to a chart received in evidence, which is Respondent's Exhibit 16, you will note, Mr. Cody, that this covers gathering operations between September 4th and September 27th. You note that? A. Yes.

Q. I believe you have had an opportunity to see this or a copy of it before you are on the witness stand now? A. I have.

Q. This shows some movements, and it shows the gauging and sampling in connection with them, and on numerous occasions shows Mr. Letson as gauging and sampling in connection with those shipments on both The Texas Company oil and oil which was taken from producers. A. Yes, sir.

Q. Did you see Mr. Letson gauge or sample upon any of those occasions? A. No, sir.

Trial Examiner Scharnikow: Or on any occasion.

(Testimony of Alfred George Cody.)

Q. (By Mr. Hackler): Or on any occasion prior to the time [3097] you were fired?

A. No, sir. Talking about the period during the strike?

Q. Yes. A. No, sir.

Q. I mean, of course, after your return from vacation and while you were still working during the strike. A. No.

Q. Did he at any time tell you during that period that he was doing gauging and sampling?

A. No.

Q. Or that he was issuing any run tickets?

A. No.

Q. Did you ever see any run tickets issued by him? A. No, sir.

Q. On the occasion that you testified to at Yorba Linda, you said you questioned Mr. Letson with reference to what was going on, and what was his reply? A. That he didn't know.

Q. Were there any other occasions on which you asked Letson what was going on with reference to gathering systems, or if he knew what was going on?

A. Yes, sir.

Q. More than one occasion? A. Yes, sir.

Trial Examiner Scharnikow: You testified as to one other [3098] on your direct. Are there others than those two now, the one in the Board's case and the one on your present appearance on the stand?

The Witness: That is the only two times that I remember.

(Testimony of Alfred George Cody.)

Q. (By Mr. Hackler): And on both occasions what was his reply?

A. He denied that he even knew what the So-Cal gauger was doing on top of the Elliot tank.

Q. I believe in the direct testimony you mentioned an occasion when some gauger of some other company, I forget just the name of that company, that you discussed or had a conversation with Mr. Letson with reference to who was gauging a tank, and it turned out to be, according to Letson, a man from what company? [3099] A. So-Cal.

Q. In your direct testimony I mean——

A. No, I didn't say the right one.

Q. You didn't say the right name of that company. Does this exhibit, and particularly the writing "So-Cal equals So-Cal Oil and Refining Company", with reference to Huntington Beach gauging on the 8th or at various times where the word So-Cal appears under gauging, is that what you had reference to?

A. That is the gauger I had reference to. [3100]

* * * * *

Q. Now, was it your testimony that you understood in the course of the strike you were to put in the black book matters connected with the production department as well as matters under the pipe line division?

A. Only to the extent of the wells that were running in the different fields.

* * * * *

Q. (By Mr. Hackler): Now, in reading over the

(Testimony of Alfred George Cody.)

information from this black book, do you know whether the reference is made therein by you or others to seals or in all instances numbered seals?

A. No.

Trial Examiner Scharnikow: Do you know now whether in any of those cases the seals referred to were numbered seals in your report, for example, under Respondent's Exhibits 23 and 24?

The Witness: Yes, those were. [3108]

Trial Examiner Scharnikow: All of them?

The Witness: Yes, sir, all of them were numbered seals that I referred to.

Q. (By Mr. Hackler): In each instance you referred to a numbered seal did you put the number down in your report, as far as you can recall?

A. Number of the tank, not the number of the seal. It wouldn't be there. [3109]

* * * * *

Q. (By Mr. Hackler): Now, let me ask you, Mr. Cody, if prior to the strike and while you were acting as a gauger for the company, if any occasions, to your knowledge, arose when the suction gates shown on General Counsel's Exhibit 47 at those tanks were opened at a time when oil was not being shipped through the gathering system? A. No. [3114]

* * * * *

Q. (By Mr. Hackler): Prior to the strike, did pipe line employees gauge and sample the gasoline tanks at Plant 5? A. Yes, sir. [3119]

In the United States Court of Appeals
for the Ninth Circuit

No. 12916

THE TEXAS COMPANY, a corporation,
Respondent,
vs.

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, “In the Matter of The Texas Company and Robert Rissman,” and “In the Matter of the Texas Company and George Cody,” the same being known as Cases Nos. 21-CA-295 and 21-CA-375, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and the order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating Isadore Greenberg, Trial

Examiner for the National Labor Relations Board, dated October 11, 1949.

2. Order designating William F. Scharnikow Trial Examiner for the National Labor Relations in place and stead of Isadore Greenberg, dated October 25, 1949.

3. Stenographic transcript of testimony taken before Trial Examiner Scharnikow on October 26, 27, 28, and 31, November 1 through 4, 7, 8, 11, and 14 through 19, 21, 22, and 23, 1949, together with all exhibits introduced in evidence; also rejected exhibits.

4. Joint request of Petitioner (Respondent before the Board and General Counsel, dated December 2, 1949, for extension of time for filing briefs before the Trial Examiner.

5. Copy of Chief Trial Examiner's telegram, dated December 5, 1949, granting all parties extension of time for filing briefs.

6. Petitioner's telegraphic motion to dismiss the amended consolidated complaint dated May 15, 1950. (Denied, see Trial Examiner's Intermediate Report, dated June 16, 1950, page 3.)

7. General Counsel's opposition to Petitioner's motion to dismiss the amended consolidated complaint dated May 18, 1950.

8. Copy of Trial Examiner Scharnikow's Intermediate Report, dated June 16, 1950 (annexed to Item 18 hereof); order transferring cases to the

Board, dated June 16, 1950, together with affidavit of service and United States Post Office return receipts thereof.

9. Petitioner's telegram, dated June 19, 1950, requesting extension of time for filing exceptions and brief, also requesting permission to argue orally before the Board. (Petitioner's request for oral argument denied, see Board's Decision and Order dated April 16, 1951.)

10. Petitioner's telegram, dated June 20, 1950, requesting further extension of time for filing exceptions and brief.

11. General Counsel's telegram, dated June 20, 1950, opposing Petitioner's request for extension of time for filing exceptions and brief.

12. Copy of Board's telegram, dated June 21, 1950, granting all parties extension of time for filing briefs.

13. Petitioner's telegram, dated July 28, 1950, requesting still further extension of time for filing briefs.

14. Petitioner's exceptions to the Intermediate Report, received July 31, 1950.

15. Copy of Board's telegram, dated August 2, 1950, granting all parties still further extension of time for filing briefs.

16. General Counsel's exceptions to the Intermediate Report, received August 2, 1950.

17. Document entitled Exceptions to the Intermediate Report and Recommended Order received from George Cody, Charging Party, on August 11, 1950.

18. Copy of Decision and Order issued by the National Labor Relations Board on April 16, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 15th day of June, 1951.

/s/ FRANK M. KLEILER,
Executive Secretary

[Seal] NATIONAL LABOR RELATIONS
BOARD

[Endorsed]: No. 12916. United States Court of Appeals for the Ninth Circuit. The Texas Company, a corporation, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition to Review and Petition for Enforcement of Order of the National Labor Relations Board.

Filed: June 19, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12916

THE TEXAS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW AND TO SET
ASIDE A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:

The Texas Company makes this petition pursuant to Sec. 10(f) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, June 23, 1947, Ch. 120, 61 Stat. 136; 29 USCA, Sec. 151, et seq., herein called the National Labor Relations Act as amended, and states and alleges:

I.

The Texas Company, herein called the petitioner, is a corporation of the State of Delaware with its headquarters in New York City; that it is engaged in the production, manufacture, marketing, and distribution of petroleum products throughout the United States; that it is duly qualified to do business in all of the states of the United States, including the State of California; and that it transacts busi-

ness in the State of California and maintains offices at 929 South Broadway, Los Angeles 15, California.

That the National Labor Relations Board, herein called the respondent, is an agency of the United States Government existing by virtue of the National Labor Relations Act as amended and is charged with the enforcement of said Act.

That the foregoing is and was true at all times material hereto.

II.

That the General Counsel of the respondent issued a complaint against the petitioner, alleging that the petitioner committed certain unfair labor practices against one George Cody, and prosecuted the complaint against the petitioner before the respondent and its agents; that said proceeding was and is entitled "In the Matter of The Texas Company and George Cody, Case No. 21-CA-375"; that said case and another and separate case entitled "In the Matter of The Texas Company and Robert Rissman, Case No. 21-CA-295" were consolidated in the proceedings before the respondent and its agents and were included by the respondent in the same decision; and that this Petition and the relief hereinafter requested concerns only the case entitled "In the Matter of The Texas Company and George Cody, Case No. 21-CA-375."

III.

That on April 16, 1951, the respondent, by a majority of three members and with a dissent by two members, made and issued a Decision and Order in said Case No. 21-CA-375 directed against the peti-

tioner, a copy of which Order is attached hereto and made a part hereof; that said Order is a final Order of the respondent; and that the only relief from said Order available to the petitioner is a review of said Decision and Order by an appropriate United States Court of Appeals, pursuant to Sec. 10(f) of the National Labor Relations Act as amended.

IV.

That said Decision and Order of the respondent is based upon the refusal of the petitioner to reemploy said George Cody, a former supervisory employee of the petitioner, who had continued to work for the petitioner during a strike by the petitioner's nonsupervisory employees, but who refused to do some of the work assigned to him by the petitioner, as a result of which he was discharged by the petitioner; that the said Decision and Order and the findings and conclusions therein are not supported by, but are contrary to, the evidence concerning the nature of the application of George Cody to the petitioner for reemployment after the termination of the strike above mentioned, and concerning the reasons of the petitioner for refusing to reemploy George Cody; that said Decision and Order erroneously interprets and applies the National Labor Relations Act as amended to the refusal of the petitioner to reemploy George Cody, its former supervisory employee; that said Decision and Order raises important issues of law concerning the status of supervisory employees and the rights and obligations of employers and supervisory employees under said Act; and that the entire Decision and Order of the respondent and the

findings and conclusions therein are not supported by the evidence on the record before the respondent considered as a whole, and are contrary to the National Labor Relations Act as amended.

V.

That the unfair labor practices in question in said case were alleged to have been engaged in near Los Angeles, California, within the jurisdiction of this court; that the petitioner was at all times a party to the proceedings before the respondent and its agents; that the petitioner is aggrieved by the making and issuing of the Decision and Order of the respondent as above set forth; that the petitioner is a party aggrieved by a final Order of the respondent within the terms of Sec. 10(f) of the National Labor Relations Act as amended; that this Court is the United States Court of Appeals in the circuit wherein the unfair labor practices in question were alleged to have been engaged in by the petitioner and wherein the petitioner transacts business; and that this Court is an appropriate United States Court of Appeals wherein to obtain a review of said Decision and Order of the respondent and the findings and conclusions therein, and has power to review and set aside said Decision and Order and to grant the relief herein requested.

Wherefore, the petitioner prays that this Honorable Court review the Decision and Order of the respondent of April 16, 1951, in said Case No. 21-CA-375 and the findings and conclusions therein, pursuant to Sec. 10(f) of the National Labor Rela-

tions Act as amended; and that upon the filing with the Clerk of this Court of a copy of the notice to the respondent of the filing of this petition, together with proof of service of said notice, the respondent be directed to certify a transcript of the entire record of the proceedings and the Decision and Order in said case and all the pleadings, testimony, evidence, and other things or matters upon which the Decision and Order of the respondent was made, and to file such transcript, when so certified, with this Court.

Petitioner further prays that this Honorable Court make and enter a decree setting aside the said Decision and Order of April 16, 1951, of the respondent, the National Labor Relations Board in said Case No. 21-CA-375, and the findings and conclusions therein; ordering the dismissal of the complaint against the petitioner in said case; and granting to the petitioner such other and further relief as the Court may deem just and proper.

Dated at Los Angeles, California, May 2, 1951.

Respectfully submitted,

/s/ J. A. McNAIR,
CHARLES M. BROOKS,
Attorneys for the Petitioner.

ORDER

Upon the entire record of the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Texas Company, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating with regard to the hire and tenure of employment of George Cody.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Oil Workers International Union, affiliated with the Congress of Industrial Organizations, or Locals 120 or 128 thereof, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer George Cody immediate employment as an employee in its pipe line division of the refining department, Pacific Coast Division, Los Angeles, California.

(b) Make whole George Cody in the manner set forth in the section entitled "The Remedy," for any loss of pay he may have suffered by reason of the Respondent's discrimination against him.

(c) Upon request, make available to the Board or its agents, for examination and copying, all pay-

roll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the right of employment under the terms of this Order.

(d) Post at its office for the pipe line division of the refining department, Pacific Coast Division, Los Angeles, California, copies of the notice attached hereto.³⁶ Copies of said notice shall be furnished to the Respondent by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of said Respondent, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Duly Verified.

[Endorsed]: Filed May 3, 1951. Paul P. O'Brien, Clerk.

³⁶ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO THE PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29, U.S.C., Supp. III, Secs. 151, et seq.), herein called the Act, files this answer to the petition for review of an order issued by the Board against The Texas Company, Petitioner herein, and the Board's request for enforcement of said order.

1. Answering the allegations in paragraphs I, II, III, IV and V of the petition for review (pp. 1-3, 4-5), the Board prays reference to the certified transcript of the entire record of the proceedings before the Board filed herewith, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board and all other proceedings had in this matter.

2. Further answering, the Board denies each and every allegation of error contained in paragraph IV of the petition to review (pp. 3-4), and avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and

are in all respects valid and proper under the Act.

3. Further answering, the Board, pursuant to Section 10(e) of the Act, respectfully requests this Honorable Court to enter a decree enforcing its order issued against Petitioner on April 16, 1951, in the proceedings designated on the records of the Board as Case No. 21-CA-375, entitled "In the Matter of The Texas Company and George Cody." In support of this request the Board respectfully shows:

(a) This Court has jurisdiction of the petition herein and of this request for enforcement by virtue of Section 10 (e) and (f) of the Act, the unfair labor practices having occurred within this judicial circuit.

(b) Upon all proceedings had in said matter before the Board, as more fully shown by the certified record filed herewith, the Board, on April 16, 1951, duly stated its findings of fact and conclusions of law and issued an order directed to Petitioner (referred to in the order as Respondent), its agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

ORDER

Upon the entire record of the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Texas Company, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating with regard to the hire and tenure of employment of George Cody.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Oil Workers International Union, affiliated with the Congress of Industrial Organizations, or Locals 120 or 128 thereof, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer George Cody immediate employment as an employee in its pipe line division of the refining department, Pacific Coast Division, Los Angeles, California.

(b) Make whole George Cody in the manner set forth in the section entitled "The Remedy," for any loss of pay he may have suffered by reason of the Respondent's discrimination against him.

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay

due and the right of employment under the terms of this Order.

(d) Post at its office for the pipe line division of the refining department, Pacific Coast Division, Los Angeles, California, copies of the notice attached hereto.³⁶ Copies of said notice shall be furnished to the Respondent by the Regional Director for the Twenty-first Region, and shall, after being duly signed by a representative of said Respondent, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

(c) On April 16, 1951, the Board's Decision and Order were duly served upon Petitioner.

(d) Pursuant to Section 10 (e) and (f) of the Act, the Board is certifying and filing herewith a transcript of the entire record in the proceedings before the Board, including the pleadings, evidence, findings of fact, conclusions of law, and order.

Wherefore, the Board prays this Honorable Court

³⁶In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

that it cause notice of the filing of this answer and request for enforcement, and the filing of the certified record in this proceeding, to be served upon Petitioner, and that this Court take jurisdiction of the proceedings and of the questions to be determined therein, and make and enter upon the pleadings, evidence, and proceedings, set forth in the entire certified record of said proceedings, and upon so much of the order as set forth hereinabove, a decree denying the petition to review and set aside, and enforcing in whole said order of the Board, and requiring Petitioner and its agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 15th day of June, 1951.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will offer to George Cody immediate employment as an employee, and make him whole for any loss of pay suffered as a result of the discrimination against him.

We Will Not in any like or related manner interfere with, restrain, coerce, our employees in the exercise of the right to self-organization,

to form labor organizations, to join or assist Oil Workers International Union, affiliated with the Congress of Industrial Organizations or Locals 120 or 128 thereof, or any other labor organization to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

Dated.....

THE TEXAS COMPANY

(Employer)

By

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed June 18, 1951. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS

Comes now The Texas Company, the Petitioner in the above-captioned proceeding and, in conformity with the rules of this Court, hereby states the Points upon which it intends to rely in its petition in this matter and hereby designates the parts of the record to be contained in the printed record, as follows:

Statement of Points

I) The Respondent's findings of fact, conclusions of law, and interpretations of the National Labor Relations Act, as amended, are not supported by substantial evidence on the record considered as a whole and are contrary to the provisions, intent, and policy of said Act.

(a) Cody did not engage in concerted activity within the meaning of Section 7 of the National Labor Relations Act, as Amended; nor did he make "common cause" with the striking employees.

(b) The refusal by the Petitioner to employ Cody did not, nor could it be inferred that it would, discourage membership of employees in a labor organization within the meaning of Section 8 (a) (3) of the National Labor Relations Act, as Amended.

(c) Cody's attempt to pick and choose the work he would perform would not be protected activity within the meaning of the National Labor Relations Act, as Amended, even if he had been an "employee" as defined in the Act.

(d) Cody did not make application for a job as a new employe.

(e) Cody was discharged for "cause" within the meaning of the National Labor Relations Act, as Amended; he was refused employment for a "cause" which was a "permissible criterion" for such refusal within the meaning of the Act.

(f) Petitioner did not make "a practice of downgrading to their former positions those who were unsatisfactory as supervisors."

(g) The performance of, or the omission to perform, an act need not be "tainted with illegality" for it to constitute a "cause" for which one may be discharged and/or refused employment.

(h) Activities which are unprotected by the National Labor Relations Act, as Amended, do not later become "protected" after legitimate and permissible disciplinary action has been taken.

(i) The Respondent's interpretation of the National Labor Relations Act, as Amended, contravenes the Congressional intent to disenfranchise supervisors and wholly remove them from any protection of the Act. The Respondent has attempted to do by indirection that which it is precluded from doing directly.

(j) Section 10 (c) of the National Labor Relations Act, as Amended, forbids the Respondent from ordering backpay to or the reemployment of Cody, who was admittedly discharged "for cause."

(k) If any discouragement of or interference with union membership were occasioned by the discharge of and refusal to employ Cody, it would be per-

missible under the Act.

(I) There is no finding or evidence of anti-union bias or illegal motive on the part of the Petitioner.

(II) The entire order of the Respondent should be set aside and the complaint dismissed as being repugnant to the intent, purpose and policy of the National Labor Relations Act, as Amended.

(III) Even if it is assumed that Petitioner violated the National Labor Relations Act, as Amended, Sections 1 (b) and 2 (d) of Respondent's order are unwarranted by the law and the evidence in that they go beyond the scope of the unfair labor practice found by Respondent to have been committed.

* * * * *

Dated at Los Angeles, California, June 28, 1951.

Respectfully submitted,

/s/ J. A. McNAIR,

CHARLES M. BROOKS,

Attorneys for the Petitioners.

[Endorsed] : Filed June 29, 1951. Paul P. O'Brien,
Clerk.

No. 12916.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE TEXAS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S BRIEF.

J. A. McNAIR,

CHARLES M. BROOKS,

929 South Broadway,
Los Angeles 15, California,

Attorneys for Petitioner.

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PAUL P. O'BRIEN
CLERK



TOPICAL INDEX

	PAGE
Statement as to jurisdiction.....	1
Statement of the case.....	3
Specification of errors.....	7
Summary of the argument	9
Argument	10
Point I. The Board's order is contrary to the provisions and purposes of the Act.....	10
A. The decision and order repudiates the congressional intent	10
B. The Board's findings and conclusions are erroneous as to downgrading of supervisors.....	20
C. Section 14(a) does not grant supervisors the protection of the Act.....	25
D. The Board erroneously converted Cody's status from that of "nonemployee" to that of "employee".....	28
E. The Board's decision is in conflict with other Board and court decisions	33
Point II. Cody did not engage in "concerted activity" within the meaning of Section 7 of the Act; nor did he make "common cause" with the striking employees.....	39
A. Cody's activity was not "concerted"	40
B. Cody's activity was not for "mutual aid or protection"..	44
C. Cody did not, nor could he legally, make "common cause" with the strikers.....	46

Point III. The refusal by the petitioner to employ Cody did not, nor could it be inferred that it would, discourage membership of employees in a labor organization within the meaning of Section 8(a)(3) of the Act.....	48
A. If any discouragement of or interference with union membership were occasioned by the discharge of and refusal to employ Cody, it would be permissible under the Act	49
B. The Potlatch case.....	55
C. The Panaderia case.....	58
Point IV. Cody was discharged "for cause" within the meaning of the Act; he was refused employment for a "cause" which was a "permissible criterion" for such refusal within the meaning of the Act.....	59
A. The meaning of "for cause".....	59
B. Cody's activity was unprotected even if he had been an employee	62
C. Section 10(c) of the Act forbids the Board from ordering back pay to or the reemployment of Cody, who was admittedly discharged "for cause".....	72
Conclusion	76

TABLE OF AUTHORITIES CITED

CASES	PAGE
Accurate Threaded Products Company, 90 NLRB 1364.....	11, 34
Alabama Marble Company, 83 NLRB 1047.....	11, 33
Alaska Salmon Industry, Inc., 78 NLRB 185.....	45
C. G. Conn, Ltd. v. N. L. R. B., 108 F. 2d 390.....	63, 65
Carnegie-Illinois Steel, 84 NLRB 851.....	20, 63, 70
Columbia Pictures Corp., 94 NLRB No. 72.....	20
Di Giorgio Fruit Corp. v. N. L. R. B., C. A. D. C., June 21, 1951, No. 10605, F. 2d, 28 LRRM (BNA) 2195.....	11, 31, 32, 33
Duluth Bottling Association, 48 NLRB 1335.....	70
Edward G. Budd Mfg. Co. v. N. L. R. B., 332 U. S. 840, 68 S. Ct. 262, 92 L. Ed. 412.....	27, 28, 33, 52
El Dorado Limestone Co., 83 NLRB 746.....	34
Elastic Corporation, 84 N. L. R. B. 768.....	62, 71, 72
Florida Telephone Corporation, 88 NLRB 1429.....	34
Fontaine Converting Works, Inc., 77 NLRB 1386.....	63, 68
Godchaux Sugars, Inc., 44 NLRB 874.....	33
Greater New York Broadcasting Corp., 48 NLRB 718.....	63, 70
Home Beneficial Life Insurance Co. v. N. L. R. B., 159 F. 2d 280	63
Lily Tulip Cup Corp., 88 NLRB 892.....	11, 20, 22, 23, 54
Loveman, Joseph & Loeb v. N. L. R. B., 146 F. 2d 769.....	63, 66
Maryland Drydock Co., 49 NLRB 733.....	33
Morand Bros. Beverage Co. v. N. L. R. B., C. A. 7, July 23, 1951, No. 10335, F. 2d, 28 LRRM (BNA) 2364....	18, 57, 70
National Labor Relations Board v. Air Associates, Inc., 121 F. 2d 586	50
National Labor Relations Board v. Bird Machine Co., 161 F. 2d 589	46

National Labor Relations Board v. Citizen News Company, 134 F. 2d 970.....	69
National Labor Relations Board v. Draper Corp., 145 F. 2d 199	63
National Labor Relations Board v. Edward G. Budd Mfg. Co., 169 F. 2d 571.....	11, 15
National Labor Relations Board v. Illinois Bell Telephone Co., 189 F. 2d 124.....	39, 40, 42, 44, 66
National Labor Relations Board v. International Rice Milling Co., U. S., 95 L. Ed. 777, 19 Law Week. 4357.....	43, 63
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.....	59, 69, 74
National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 909, 82 L. Ed. 1381.....	18, 57
National Labor Relations Board v. Montgomery Ward & Co., 157 F. 2d 486.....	63, 64, 65
National Labor Relations Board v. Potlach Forests, Inc., 189 F. 2d 82	18, 55, 56, 57, 70
National Labor Relations Board v. Walt Disney Productions, 146 F. 2d 44.....	50
National Labor Relations Board v. Waumbec Mills, Inc., 114 F. 2d 226	57
Otis L. Boyhill Furniture Co., 94 NLRB No. 232.....	46
Pacific Gamble-Robinson Company, 88 NLRB 482.....	11, 34, 35
Pacific Lumber Co., 49 NLRB 1145.....	51
Packard Motor Car Co., 61 NLRB 4.....	33, 38, 45
Palmer Manufacturing Co., 94 NLRB No. 230.....	11, 20, 36, 45
Panaderia, Sucesion Alonso, et al., 87 NLRB 877.....	42, 43, 58, 63
Pennsylvania Greyhound Lines, Inc., 1 NLRB 1.....	50
Phelps-Dodge Corp. v. N. L. R. B., 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271.....	28, 29, 30, 31, 32, 33, 61, 62, 73
Pure Oil Company, 90 NLRB 1661.....	35
Stonewall Cotton Mills, Inc. v. N. L. R. B., 129 F. 2d 629.....	50, 60

T. B. Martin, et al. d/b/a Standard Feed Milling Co., 94 NLRB No. 191	46
The Associated Press v. N. L. R. B., 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953.....	60
The Fafnir Bearing Co., 73 NLRB 1008.....	63
The Hoover Co. v. N. L. R. B., C. A. 6, No. 11223, July 9, 1951, F. 2d., 28 LRRM (BNA) 2353.....	63, 67
Toledo Stamping and Mfg. Co., 55 NLRB 865.....	45
Tri-Pak Machinery Service, Inc., 94 NLRB No. 244.....	11, 37, 52
Union Collieries Coal Co., 41 NLRB 961, 44 NLRB 165.....	33
United A. W., et al. v. Wisconsin Employment Relations Board, 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651.....	63
Universal Camera Corp. v. N. L. R. B., U. S., 95 L. Ed. 298, 19 Law Week. 4160.....	48
Wells, Inc., 162 F. 2d 457.....	20, 38, 45, 46
Wyman-Gordon Co. v. N. L. R. B., 153 F. 2d 480.....	56, 63, 68

MISCELLANEOUS

93 Congressional Record, p. 3522.....	26
93 Congressional Record, p. 3952.....	14
93 Congressional Record, p. 4411.....	16
93 Congressional Record, p. 4804.....	17
93 Congressional Record, p. 4805.....	17
93 Congressional Record, p. 5298.....	16
93 Congressional Record, p. 6600.....	75
House of Representatives Report No. 245, 80th Cong., on H. R. 3020	12, 73
House of Representatives Report No. 510, 80th Cong., 1st Sess., on H. R. 3020.....	12, 26, 73, 75
Senate Report No. 105, on S. 1126, 80th Cong., 1st Sess., pp. 3-4	12, 25
Senate Report 105, Part 2 (Minority Views), 80th Cong., 1st Sess.	27

STATUTES

PAGE

Act of July 5, 1935, Chap. 372, 49 Stat. 449.....	4
Act of June 11, 1946, Chap. 324, 60 Stat. 237.....	3
Act of June 23, 1947, Chap. 120, 61 Stat. 136.....	1
National Labor Relations Act, Sec. 2(11)	16
National Labor Relations Act, Sec. 7.....	
.....9, 39, 40, 44, 45, 46, 47, 76	
National Labor Relations Act, Sec. 8(a)(1)	2, 35
National Labor Relations Act, Sec. 8(a)(3)	2, 9, 48, 52
National Labor Relations Act, Sec. 10(c).....	72, 73
National Labor Relations Act, Sec. 10(e).....	48
National Labor Relations Act, Sec. 10(f).....	1, 3
National Labor Relations Act, Sec. 14(a).....	25, 27
United States Code Annotated, Title 5, Sec. 1001.....	3
United States Code Annotated, Title 29, Sec. 151.....	1
Wagner Act, Sec. 2(3).....	29, 44, 48
Wagner Act, Sec. 8(3).....	51

No. 12916.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE TEXAS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S BRIEF.

Statement as to Jurisdiction.

This is an appeal upon a petition filed pursuant to Section 10(f) of the National Labor Relations Act, as amended,¹ herein called the "Act," for review and to set aside an order of the National Labor Relations Board, herein called the "Board," in Case No. 21-CA-375, one of two cases consolidated by the Board for hearing.

Upon a charge [R. 1] filed by George Cody, an individual, the General Counsel of the Board issued a complaint [R. 4] against The Texas Company, herein called the "Petitioner," and a hearing was held thereon before a duly designated Trial Examiner of the Board [R. 76]. The Board dismissed the complaint in its entirety except as it related to Cody [R. 42].

¹June 23, 1947, Chap. 120, 61 Stat. 136; 29 U. S. C. A., Sec. 151, *et seq.*

As to Cody, the complaint alleged that the Petitioner had violated Sections 8(a) (1) and (3) of the Act because [R. 8]:

“7. On or about November 16, 1948, and thereafter, George Cody was on his application refused employment by Respondent [Petitioner herein] because of his concerted activities on behalf of the Union.”

The Petitioner filed an answer to the complaint [R. 9] and a motion to dismiss [R. 14, 18]. The Trial Examiner issued an intermediate report [R. 59] finding that [R. 75]:

“The Respondent [Petitioner herein] did not discriminatorily refuse to employ George Cody to discourage membership in a labor organization.”

The Board overruled the Trial Examiner and by its decision and order found [R. 31, 49] that the Petitioner violated Sections 8(a) (1) and (3) of the Act, two members of the five-member Board dissenting [R. 54].

The Petitioner petitioned this Court to review and to set aside the decision and order of the Board in the Cody case [R. 393]. The Board answered the petition and requested enforcement of its decision and order [R. 400]. The Petitioner stated the points upon which it intends to rely on this appeal [R. 406].

The Petitioner is a corporation of the State of Delaware with its headquarters in New York City, and is engaged in the production, manufacture, marketing and distribution of petroleum products throughout the United States. It does business in the State of California, and the alleged unfair labor practice occurred near Los Angeles, California [R. 5, 6, 9, 64, 65]. The order of the

Board [R. 50, 51] is a final order of that agency directed to the Petitioner who is aggrieved by this order.

The petition in this case was filed pursuant to and the Court has jurisdiction to review the order under Section 10(f) of the Act. The review of this case is governed by that section of said Act and by the Administrative Procedure Act.²

Statement of the Case.

The issue in this case is whether the Petitioner is obligated under the Act to re-employ as a rank-and-file employee George Cody, its former supervisory employee, who was discharged because as a supervisor he had refused to do a part of the work assigned to him during a strike by the Petitioner's rank-and-file employees, and who was thereafter denied re-employment for the same reason.

The Petitioner operates a refinery at Los Angeles, California, and a Pipe Line Division, both of which are administered by its Refining Department, and is engaged in the production of crude oil in the vicinity of Los Angeles and other parts of California [R. 59, 64, 65, 136, 237-245]. The Oil Workers' International Union and its Local 128, hereinafter called the "Union," at various times have represented groups of the Petitioner's employees in the Los Angeles Area since 1938. During the ten years prior to September, 1948, Petitioner had amicable relations with the Union [R. 38, Note 12].

On September 4, 1948, the Union called a strike against the Petitioner and other oil companies on the west coast [R. 6, 8, 33, 39, Note 15, 236]. While certain unfair labor practice charges arising out of the strike were filed against the Petitioner, the Board held that it was and remained an economic strike from the beginning

²June 11, 1946, Chap. 324, 60 Stat. 237; 5 U. S. C. A., Sec. 1001, *et seq.*

until the end in November, 1948 [R. 41]; and the Petitioner was held by the Board not to have engaged in any unfair labor practices except with respect to the special case of George Cody [R. 38, Note 11, 40, 51]. The Board noted the absence of earlier unfair labor practice charges against the Petitioner and found that the Petitioner did not have any anti-union animus at any time during its dealings with the Union [R. 38]. Moreover, it should be noted that all disputes growing out of the strike were amicably settled by the Petitioner and the Union for the employees of the Refining Department, where Cody was employed [R. 65, 78-79, 81, 99, 105, 241-243].

George Cody was employed by the Petitioner as a laborer in April, 1928 [R. 65, 91]; he rose to higher and higher nonsupervisory jobs until he was promoted to assistant district foreman in the Refining Department, Pipe Line Division, in February, 1948 [R. 65, 96]. With knowledge that the law made union activity and supervisory work inconsistent, Cody obtained a withdrawal card from the Union [R. 170]. Cody was a supervisor within the meaning of the Act and as such was excluded from its coverage when he was discharged on September 28, 1948 [R. 46, 65, 82].

During the time that Cody was a nonsupervisory employee, he was active in the Union, was a member of various Union committees, negotiated with the Petitioner concerning collective bargaining contracts, and obtained several leaves of absence from the Petitioner to engage in Union business [R. 66, 99-101, 112, 172, 209]. Cody was interested in Union matters as early as 1934, and was told that Petitioner had no objections to employees belonging to a union even before the Wagner Act³ became

³July 5, 1935, Chap. 372, 49 Stat. 449.

law [R. 100]. Cody was promoted to a supervisory job strictly because of his ability, and was told at the time that union activity did not influence the choice of employees for promotion [R. 170-171].

The 1948 strike was about 10 days old when Cody returned from his vacation and commenced work [R. 97]. Beginning on September 13 and until he was discharged on September 28, Cody patrolled the Petitioner's pipe lines and reported on various conditions prevailing at the property [R. 107]. This was work normally done by line riders, gaugers, and pumpers, nonsupervisory employees included in the bargaining unit, and some of whom were normally supervised by Cody [R. 105-107, 133, 175, 176, 240]. Cody's normal job was the supervising of certain employees engaged in operating the Petitioner's pipe lines which transported crude oil from one place to another in the Petitioner's pipe-line system [R. 81, 82, 133, 240].

The Petitioner operated these pipe lines during the strike to the knowledge of Cody, who continued to work in patrolling the pipe lines [R. 131-133, 137, 247, 251-252, 278-279, 298-316, 381]. On September 21 Cody declined to deliver some "strappings," a type of table used in measuring the capacity of the Petitioner's oil tanks; the next day he declined to deliver "run tickets," a type of report showing the movement of oil in the Petitioner's pipe lines [R. 67, 107, 179-183, 195-196]. No order was given directly to Cody to deliver these reports, but he declined because he did not want to do certain things deemed by him to be direct participation in operations [R. 68, 195-196]. During this time, however, he continued to work in patrolling the pipe lines [R. 228].

On September 28 Cody was told by his supervisor to go to one of the Petitioner's pumping stations and gauge and sample the oil tanks [R. 108, 187, 318]. Cody ex-

plained that he didn't want to do this; but he offered to drive another individual to the pumping station so that the latter might perform this work [R. 108-111, 189-190]. Cody finally compelled his superior to give the "order," after which he refused to do the work [R. 110, 195]. For this reason he was discharged [R. 110-111, 188-189, 318].

Cody refused to do some of the work assigned to him because of his personal feelings developed during his past experiences in union work and because of his fear for his family [R. 108, 197], but he was willing to do other work assigned to him [R. 110, 194]. Subjectively, Cody did not want to side either with the Petitioner or with the Union in the economic struggle of the strike. He expressed the desire to be "on a team of my [Cody's] own" [R. 319].

After he was discharged, Cody applied at various times for re-employment by the Petitioner. Up until November 16, 1948, he applied for his former job as assistant foreman, but on and after that date he asked for "any job" [R. 153-154]. In all cases he applied for reinstatement with credit for his past service with the Petitioner [R. 160, 167, 200, 202, 323, 325, 328]. Cody was denied re-employment because he had refused as a supervisor to do part of the work assigned to him during the strike [R. 43-44, 54, 74, 148-149, 321, 332]. As his superior, Superintendent Dreyer told Cody his refusal to work was "premeditated" and rank insubordination [R. 200, 330]. Even after the strike was over, Cody was still unwilling to do the work that might be required of a supervisor during a strike [R. 148, 149, 321, 323, 352]. Cody apolo-

gized [R. 43, 152, 205, 323], but he was still unwilling to be on management's "team."

The Petitioner does not have a practice of downgrading to their former positions employees who were *unsatisfactory* as supervisors.

The Petitioner did not refuse Cody re-employment for the purpose of discouraging rank-and-file union activity [R. 47, 55, 74].

Specification of Errors.

1. The Board erred in its conclusion that Cody applied for work as a new employee because there is no finding that he did not seek reinstatement with seniority credits.

2. The Board erred in its conclusion that the 1947 Amendments to the Act "were not intended to change the character of union or other concerted activity engaged in by supervisors" [R. 44].

3. The Board erred in its conclusion that the exclusion of supervisors from the protection of the Act was partial instead of complete and by disregarding the Congressional intent.

4. The Board erred in its conclusion that the limitations as to supervisors' union activities imposed by the Act are of a "special character" [R. 47].

5. The Board erred in its conclusion that Cody became an "employee" after he was discharged so as to enjoy the protection of the Act.

6. The Board erred in its conclusion that Cody's activity would have been protected if he had been an "employee" at the time of his discharge.

7. The Board erred in its inference that the refusal to re-employ Cody "necessarily discouraged" membership and concerted activity in the Union [R. 49].

8. The Board erred in its finding and conclusion that Cody “made common cause” with rank-and-file employees [R. 48] and that he acted “in aid” of the rank-and-file employees [R. 49].

9. The Board erred in its failure to give appropriate consideration to the absence of any motive by Petitioner to interfere with and discourage rank-and-file union activity [R. 47] and by the lack of anti-union animus on the part of Petitioner [R. 38].

10. The Board erred in its finding that Petitioner “made a practice of downgrading to their former positions those who were unsatisfactory as supervisors” [R. 49, Note 33], and in its conclusions drawn from this unsupported finding.

11. The Board erred in ordering Petitioner to cease and desist from discouraging membership in the Oil Worker’s International Union and its Locals 120 and 128, and to post notices in that regard, in that there is no evidence or other basis for an inference that membership in these locals was or might reasonably be calculated to be discouraged.

12. The Board erred in ordering Petitioner to employ Cody and to pay him back pay because of the prohibitions in Section 10(c) of the Act against such for individuals discharged or suspended “for cause”.

13. The Board erred in its conclusion that the only concerted or union activity which is not “protected” is that which is “tainted with illegality” [R. 45].

14. The Board erred in its finding and conclusion that the cause for the refusal to rehire Cody was “protected” by the Act.

15. The Board erred in giving *ex post facto* effect to the Act’s protection features.

Summary of the Argument.

I.

The Board's interpretation of the Act, is contrary to the specific provisions of the Act, and contravenes the Congressional intent to disenfranchise supervisors and wholly remove them from any protection of the Act. The Board has attempted to do by indirection that which it is precluded from doing directly.

II.

Cody did not engage in concerted activity within the meaning of Section 7 of the Act; nor did he make "common cause" with the striking employees. Cody's activity was not for "mutual aid or protection," and such is precluded because of the inherent disparity of interest as to supervisors and "employees."

III.

The refusal by the Petitioner to employ Cody did not, nor could it be inferred that it would, discourage membership of employees in a labor organization within the meaning of Section 8(a) (3) of the Act; the only union or concerted activity that conceivably could be discouraged is that of supervisors and that is permissible under the Act.

IV.

Cody was discharged "for cause" within the meaning of the Act; he was refused employment for a "cause" which was a "permissible criterion" for such refusal within the meaning of the Act. The activity was "unprotected" at the time it occurred and it cannot be retroactively converted into "protected" activity.

ARGUMENT.

POINT I.

The Board's Order Is Contrary to the Provisions and Purposes of the Act.

At the outset we should note that everything material to the alleged unfair labor practice in this case occurred after the present Act became effective on August 22, 1947. Certain references to the Act's predecessor,⁴ herein called the "Wagner Act," are made in our arguments because the Board has rested its decision, conclusions, and findings upon cases decided and doctrines enunciated under the Wagner Act. Nevertheless, the fact remains that the conduct of Petitioner must be measured in terms of the Act as it now exists and did exist when the conduct complained of occurred. Our references to the earlier law are made, therefore, merely to complete our arguments that the Board's holdings are wholly unsupported by law and evidence.

A. The Decision and Order Repudiates the Congressional Intent.

This case is one wherein the Board has substituted its judgment for that of Congress and has legislated under the guise of administration. Although the Board should know full well that Congress, when it amended Section 2 (3) of the Act in 1947, laid to rest the dispute over the status of supervisors, it has, nevertheless, played "fast and loose" with the will of Congress in the instant case, as illustrated by the following examples:

- (1) It employs such vague and confusing phrases as ". . . these amendments . . . were not intended to

⁴See Note 3, *supra*.

change the character of union or other concerted activity engaged in by supervisors” [R. 44];

(2) It clings to its Wagner Act philosophy that supervisors are half master and half servant [R. 45, Note 26];

(3) It coins previously unheard-of terms and phrases such as “. . . special character of the limitations on union activity by supervisors” [R. 47];

(4) It gives the statute an *ex post facto* application [R. 46, Note 28];

(5) It reaches meaningless and unexplained conclusions that Cody made “common cause” [R. 48] with and that his activity was “in aid” of “the very rank-and-file employees whose number he was later prevented from joining . . .” [R. 49];

(6) It concludes that a “non-employee” engaged in “concerted activity” with “employees” despite the Act’s clear separation of the interests of the two;

(7) It rules that Congress intended that an employer could discriminate against a supervisor in certain respects only, but gives no reason or logic to support its belief [R. 49].

The Board in this case has disregarded, without explanation, its own and court decisions, as well as the clear language of the Act and its voluminous legislative history.⁵

⁵*DiGiorgio Fruit Corporation v. N.L.R.B.*, C. A. D. C., June 21, 1951, No. 10605, F. 2d, 28 Labor Relations Reference Manual (BNA) 2195; *N.L.R.B. v. Edward G. Budd Mfg. Co.* (C. A. 6, 1948), 169 F. 2d 571; *Alabama Marble Company* (1949), 83 NLRB 1047; *Lily Tulip Cup Corporation* (1950), 88 NLRB 892; *Pacific Gamble-Robinson Company* (1950), 88 NLRB 482; *Accurate Threaded Products Company* (1950), 90 NLRB 1364; *Palmer Manufacturing Company* (1951), 94 NLRB No. 230; *Tri-Pak Machinery Service, Inc.* (1951), 94 NLRB No. 244.

In considering the effect of the changed definition of "employee" in the Act, we shall refer rather extensively to the Congressional reports and debates, because the Board has so blythely ignored the clear and unmistakable exclusion of supervisors as a class from all protection of the Act. Since the Board would obscure this specific exclusion with fancy phrases, it becomes necessary that we examine carefully what Congress intended.

The exclusion of supervisors from the "employee" class originated in the House of Representatives (H. R. 3020, 80th Congress, 1st Session) and the Committee Report⁶ noted some historical developments on the subject which prompted the legislation including the following: (pp. 13-14):

" . . . The bill, by excluding foremen and other supervisory personnel from the definition of 'employee,' deprives the Board of jurisdiction over them.

* * * * *

"When Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners,' not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the act.

* * * * *

"In deciding the Maryland Drydock case, the Board pointed out that unionizing foremen under the Labor Act would be bad for output, which the act was intended to promote, bad for the rank and file, and bad for the foremen themselves. . . . Then,

⁶House of Representatives Report No. 245, 80th Congress, 1st Session. See also Senate Report No. 105, on S. 1126, 80th Congress, 1st Session, pages 3-4, to the same effect.

in *Matter of Packard Motor Car Company* (61 N. L. R. B. 4 (1945)), the Board changed its mind again, . . . As a result of the Board's ruling in the Packard case, both Houses of Congress, by overwhelming majorities, passed the so-called Case bill, exempting supervisors from the operation of the Labor Act. The President vetoed the bill, and the Board continued to unionize foremen at an accelerated pace."

The Senate Report⁶ states:

"In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when it adopted the Case bill [to exempt supervisors from the operation of the Labor Act]. By drawing a more definite line between management and labor we believe the proposed language has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of that bill."

The House Committee Report, *supra*, indicated how thoroughly the Committee had studied the question of supervisors' status under the Act, and how completely incompatible with the purposes of the law was union activity by supervisors. The report stated on page 14:

"It [unionizing supervisors] is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants. . . ."

The Board said in its decision "the Trial Examiner has misconceived the effect of the 1947 amendments which removed supervisors from the protection which the Act

accords employees" [R. 44]. We submit that the following analysis makes clear that it is the majority members of the Board in this case who have the misconception.

The Board said that these amendments "were not intended to change the character of union activity or other concerted activity engaged in by supervisors" [R. 44]. And, without explanation or support, concluded that there is some kind of "special character of the limitations on union activity by supervisors" [R. 47].

From what and how the Board reached these conclusions, as well as what they mean, remains a mystery! Further reference to the legislative history on this subject reveals that the Board is clearly in error. Congress intended to and did *completely* "change the character" of union activity by supervisors under the Act. Their exclusion was intended to be and is *complete*, witness a statement by Senator Taft, co-author of the legislation:⁷

"The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act.

"It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various in-between steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate fore-

⁷Congressional Record, April 23, 1947, 93 Cong. Rec. 3952.

men's unions not affiliated with the men's unions, but it was found that that was almost impossible; that there was always an affiliation of some sort; that foremen, in order to be successful in a strike, must have the support of the employees' union. A plant can promote other men to be foremen if necessary. The tie-up with the employees is inevitable. The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States."

We submit there are no words in the English language that could make this point clearer. Senator Taft said in the statement above that foremen would be "restored to the basis . . . enjoyed before the passage of the Wagner Act." That is complete and thorough exclusion! There were *no* protections as to union activity before, during, or after employment, prior to the Wagner Act.⁸ So it is today as to supervisors.

The Board just has nothing to lean upon to support its statement that the law doesn't "change the character" of supervisors' activities. Frankly, we are at a loss to understand what the Board had in mind. But we do know that Congress clearly intended that the Board could not order a discharged foreman re-employed. The Board's approach

⁸*N.L.R.B. v. Edward G. Budd Manufacturing Co., supra*, at page 577, the court said: "But prior to the National Labor Relations Act no federal law prevented *employers* from discharging employees for exercising these rights or from refusing to recognize or bargain with labor organizations. The National Labor Relations Act created rights *against employers* which did not exist before."

in this decision is that it can do *indirectly* that which the law prohibits it from doing *directly*.

Some members of the Senate tried to write the supervisors' exclusion in an "in-between" fashion, but, as noted in Senator Taft's statement above, the authors of the Act concluded that the supervisors "either had to be a part of management and *not have any rights* . . . or be treated entirely as employees." (Emphasis added.)⁹ Congress decided to give them no rights, and the Board has no authority to change that decision.

Senator Smith of New Jersey, a member of the Senate Labor Committee which considered this legislation, said on the Senate floor on April 30, 1947, during debates on this law (93 Cong. Rec. 4411):

"It [the definition of supervisor] recognizes a supervisor as representing management, and not representing labor and where the supervisor has to represent management, it seems only proper that he should not be in the category of being union-minded because unfortunately controversies between management and the unions do occur."

But, the Board orders Cody re-employed because it believes he was "union-minded." It wants to force the Petitioner here to re-employ Cody because it *thinks* he made "common cause" with "employees." Yet, the Board admits that he could be discharged because of what he did.

Senator Flanders, of Vermont, author of a part of Section 2 (11) of the Act containing the definition of

⁹One such "in-between" method was proposed on the floor of the Senate on May 13, 1947, and was rejected (93 Cong. Rec. 5298).

“supervisor,”¹⁰ remarked as follows on the Senate floor on May 7, 1947, in connection with the exclusion of supervisors (93 Cong. Rec. 4804):

“The reasons [for removing this supervisory force from the area of collective bargaining] are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost the control of his business. He cannot run it effectively.”

Once again the completeness of the exclusion of supervisors is demonstrated by a statement of one instrumental in writing the law. Not only does it guarantee freedom to *discharge* supervisors, but also it assures the right to *keep* them discharged. Otherwise, the freedom to discharge and the right to demand loyalty are meaningless.

It is obvious, therefore, that the three majority Board members, and not the Trial Examiner and the two dissenting members, have “misconceived the effect of the 1947 Amendments which removed supervisors from the protection which the Act accords to ‘employees’ ” [R. 44].

The above references to the legislative history of the Act constitute unassailable and unmistakable evidence that Congress intended that foremen like Cody could not get any protection from the Act, even by the devious method here employed by the Board. The following statement on page 5 of the Senate Report, *supra*, shows that Congress intended strict administration and not lukewarm application of the exclusion:

“It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent

¹⁰93 Cong. Rec. 4805, May 7, 1947, amendment of Senator from Vermont agreed to.

tendency to subordinate their interests wherever they conflict with those of the rank and file.”

Yes, management can now demand “the undivided loyalty of its foremen” under the Act. That is, it can unless the Board is permitted to warp the law as it would do in this decision. The Board dropped the matter of divided loyalties [R. 44] with the casual implication that Congress intended that an employer would be absolved from liability as to supervisors *only* for their discharge and the requirement to bargain. But there is nothing in the law from which the Board may draw such an inference. Moreover, the Congressional reports and debates refute this theory of *partial* exclusion, under which the whole purpose of the amendment would be thwarted. Congress wanted to restore supervisors to their historical position under the common law when they were the “master” and not the “servant.” Congress intended supervisors to be a part of management and to give their undivided loyalty to the employer. The Board would, however, “water down” this Congressional mandate by the effect of this decision.

The supervisor amendment was “made to order” for the situation involved in the instant case. The Petitioner was engaged in an economic struggle with the Union,¹¹ and had resumed some and accelerated other operations for “bona fide business considerations.” [R. 38]. Cody, along with other supervisors, all of whom were working

¹¹The strike was and remained an economic strike as distinguished from an unfair labor practice strike [R. 41]. See *Mackay Radio & Telegraph Co.* (1938), 304 U. S. 333, 58 S. Ct. 909, 82 L. Ed. 1381; *N.L.R.B. v. Potlatch Forests, Inc.* (C. A. 9, 1951), 189 F. 2d 82; *Morand Bros. Beverage Co. v. N.L.R.B.*, C. A. 7, July 23, 1951, No. 10335, F. 2d, 28 Labor Relations Reference Manual (BNA) 2364; *International Shoe Co.* (1951), 93 NLRB 159.

during the strike, was instructed to perform a certain task in connection with this program of accelerated operations [R. 263-264]. But Cody, from whom the Petitioner had a legal right to *demand* "undivided loyalty," decided that he didn't want to do what he was instructed to do. Instead, he wanted to remain in his position of assistant foreman and receive his pay for that job, but he wanted to "haul" another person to do this assignment [R. 109-110, 189]. This was precisely the occasion when the Petitioner *needed* Cody and when he could be compelled to be on management's "team." But when his superior gave him "the order," he refused to obey and he was discharged for this insubordinate action [R. 110-111, 188-189, 318]. The Board held this discharge to be privileged, but, ruled the Board, Petitioner could not thereafter refuse to re-employ him because he had once been insubordinate. Such a ruling is repugnant to the policies, provisions and principles of the Act.

Here is the way such administration of the statute would work under the Board's order: Cody would come to work as a laborer, the lowest classification and the one into which new employees are placed. Immediately he would demand credit for his 20 years' previous service—he said he was trying to protect this service [R. 200, 323, 325, 328]. He would demand credit for his accumulated rights under Petitioner's Pension and Insurance Plan—he never withdrew from this plan [R. 203]. He would insist that his seniority credit entitled him to the highest job in the Pipe Line Division—counsel for the Board argued that Cody should not be treated as a stranger [R. 122, 123]. This would have a disintegrating effect upon the industrial relations of Petitioner. Instead of enabling Petitioner to demand "loyalty" from its supervisors, as the Act intends, the enforcement of this order of the Board would wreck the authority of higher management over lesser supervisors. There would

be no power of effective discipline by which management could enforce a rule of neutrality on union matters among its supervisors.¹² Moreover, Petitioner's effectiveness to operate its business would be seriously deterred.¹³ A foreman could engage in and play favorites in union activities, whether it be due to fear or personal principle, knowing that he could always get "a job back"¹⁴ if he should be discharged for his union activity. Thus, the exclusion of supervisors from the Act's protection would be nullified and the Congressional intent defeated.

B. The Board's Findings and Conclusions Are Erroneous as to Downgrading of Supervisors.

The Board erroneously found that Petitioner "made a practice of down grading to their former positions those who were unsatisfactory as supervisors" and cited the *Lily-Tulip Cup* case, *supra* [R. 49, note 33],¹⁵ Since the Board will order a discharged foreman rehired or not, depending upon rules and past practices, it would expect the supervisor to return under and thereafter be governed by rules, labor contracts, practices, etc., just as would one who is ordered reinstated to his original position. In that way the erstwhile foreman would shortly be promoted again to a foreman; if not, the employer would be ordered by the Board to do so because his denial of promotion, so the Board would conclude, was due to his *past* union activities. Such an order by the Board

¹²*Wells, Inc.* (C. A. 9, 1947), 162 F. 2d 457; *Palmer Manufacturing Corporation, supra*; *Carnegie-Illinois Steel* (1949), 84 NLRB 851; *Columbia Pictures Corp.* (1951), 94 NLRB No. 72. See, also, Point II, *infra*.

¹³See Note 10, *supra*.

¹⁴These are the words used by Cody on the witness stand [R. 153, 200, 207].

¹⁵The lack of evidence for this finding is discussed *infra*.

would be as reasonable and plausible as the one in the instant case. Board Counsel stated that no contention was made that Cody should have been demoted [R. 119], but yet the Board based its order in large part upon this so-called “downgrading” theory. Obviously, the Board is whittling away at the statute in a manner that, if permitted to stand, would surely and shortly render the supervisor exclusion feature of the Act a nullity.

There is no substantial evidence in the record to support the Board’s finding that Petitioner had a practice of downgrading [R. 49, Note 33]. Counsel for the Board argued that Petitioner had such a practice [R. 114, 122-123], and on that basis the Trial Examiner admitted into evidence General Counsel’s Exhibits 23 and 24 [R. 124, 125]. Board Counsel agreed that Petitioner was not obligated to follow the contracts in question, but he contended that it *did* follow them under identical situations. But not one word of testimony was forthcoming to establish this contention. Therefore, the only possible basis for the Board’s finding that such practice prevailed is Board Counsel’s statement. The Board certainly cannot rely upon the contract as evidence of this finding—its Counsel (Mr. Hackler) agreed that the contract provisions created no such obligations. His purpose was to lay a foundation by the contracts for later testimony that such provisions were followed as to demoted supervisors. As noted, such evidence did not materialize.

The contract provisions do not support the Board’s finding even if they had been offered for that purpose and if Counsel had contended that they do. The contract in evidence as General Counsel’s Exhibit No. 23 [R. 125, Sec. M.] provides that “an employe incapable of performing the duties . . .” will have certain rights. So, this could not cover Cody because (1) he was not an “employee,” (2) he was not subject to the jurisdiction of or included in the unit described in the contract, and (3)

he was not “incapable of performing the duties”—he just *refused* to perform them. In General Counsel’s Exhibit No. 24 [R. 125], Section K must be read in connection with Sections H and M which describe the reasons for which a promotee may be demoted and still keep his seniority. By no stretch of the Board’s powers to draw inferences can it conclude that these contracts obligated Petitioner to permit a person who had been discharged for insubordination to retain his seniority, even if its Counsel had so contended. Thus, this finding [R. 49, Note 33] must fall as devoid of *any* supporting evidence; and likewise, the theory of the Board that this non-existent practice would support its conclusions of violations cannot be sustained.

We believe the Board must not have fully and carefully analyzed the ultimate effects of this downgrading theory it seems to be developing. Can it be that the Board is going to permit a discharge of and subsequent refusal to rehire a supervisor *only* if the employer has “no downgrading policy . . . of long standing . . . established prior to the advent of the Union”? *Lily-Tulip* case, *supra*, at page 893. In the latter case the Board held that the “no downgrading” policy “was an operative factor in Young’s discharge as a supervisor” and that the discharge was not “violative of the Act.” In our case the Board held that Cody’s discharge was for his refusal to obey an order and that such was not “violative of the Act.” Under the Board’s ruling it would appear that Petitioner could refuse to rehire Cody *only* if it had a rule that it would not rehire foremen who were discharged for insubordination. Under no authority of the Act is such required. The Board cannot shift the burden to the employer in such cases to prove that it never rehired a foreman, or that it had such a policy. The law gives the Board no such power. The crux of the issue in a refusal to hire is whether the refusal was for a reason prohibited by the

Act. The Board here agreed that the reason in Cody's case was his disobedience and that the Petitioner was free to discharge him for such disobedience.

In the *Lily-Tulip* case, *supra*, page 893, the Board said “. . . We do not believe that the policy [of no downgrading] was unlawfully invoked to deny reemployment to Young shortly after her proper discharge.” The Board has no basis in law or evidence to believe that Petitioner unlawfully invoked its inherent right to refuse in this case to rehire this insubordinate individual. The use of this inherent right could be a violation of the Act only if it was for discrimination under Section 8(a) (3) or interference, restraint, and coercion under Section 8(a) (1). To sustain such a finding, there must be substantial evidence that the normal right to refuse re-employment to Cody was invoked for discriminatory purposes. But the Board did not, nor could it on the record, make such a finding. In fact, the only findings on this question in this case are that Petitioner was not “motivated by a specific purpose to interfere with and discourage rank-and-file union activity” [majority decision, R. 47]; that there was no “anti-union animus” [Board decision, R. 38]; and that membership in and support of the Union played no part in the refusal to rehire Cody [Intermediate Report of Trial Examiner, R. 73]. Counsel for the Board *said* he was going to prove “motive,” but he failed to do so [R. 119].

The theories pronounced by the Board in this and the *Lily-Tulip* cases give the appearance of grasping for any expedient to minimize the effect of the supervisor exclusion provision. In the instant case the Board compounds its fallacious reasoning in the *Lily-Tulip* case by holding, without any supporting evidence, that this Petitioner had a practice of downgrading supervisors and, therefore, that

Cody should have been rehired. Although the Petitioner or any other employer might demote a recently promoted supervisor because he could not perform the duties, that is *not* evidence that it would demote the same individual if he had refused to obey orders. Therefore, the rationale by which this downgrading doctrine evolves is thoroughly unsound, impractical, and without legal support.

The Board seems to have entirely ignored Cody's own testimony as to the circumstances surrounding his promotion. Cody was told by his superior at that time that he no doubt understood the law and that he should sever his relations with the Union, after which Cody mentioned that he could obtain a withdrawal card [R. 129, 170]. It was not necessary to tell Cody then that if he refused to obey orders, even during a strike, he would be discharged and refused re-employment. An employer is not required to spell out to those working for him each and every act which constitutes insubordination. It is common knowledge that insubordination is a justifiable cause for discharge and a sufficient ground for refusing re-employment. It is not necessary to have a "practice" of refusing to rehire an insubordinate worker. Cody clearly understood that a foreman was a part of management and had to obey orders even if it meant that he couldn't participate in union affairs. He knew that he could not legally make "common cause" with or "aid" rank-and-file employees in union matters.

The Board's order cannot be supported by the specious reasoning it has used to weave this nebulous "downgrading policy" doctrine.

C. Section 14(a) Does Not Grant Supervisors the Protection of the Act.

The Board mistakenly relies upon Section 14(a)¹⁶ of the Act to convert Cody's admittedly "unprotected" activity into "protected" activity. The Board voids the effect of the exclusion of supervisors from the protection of the Act by reasoning that since it is not *illegal* for a supervisor to be a member of a union, then any activity on behalf of a union or union members is protected. And the Board reasons that the protection attaches only *after* the supervisor has been legitimately discharged. In other words, says the Board, if a supervisor can legally belong to a union, then he is given *ex post facto* protection for his activity even though it was not protected at the time.

Section 14(a) does not afford support for any such fantastic theory. The sole purpose of the opening clause of Section 14(a)¹⁷ of the Act was to make sure that union membership by a supervisor was not made a violation of the Act. Congress had gone so far in completely excluding supervisors, and so much had been said about supervisors being a part of management, that this clause was inserted so as to avoid any construction of the Act in a manner that would make *mere membership* a violation of the law. The report of the Senate Committee of Labor and Public Welfare¹⁸ made this clear (page 28):

"Section 14: This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State

¹⁶The decision erroneously cited this as "Section 1(a)" [R. 46].

¹⁷The opening clause of Section 14(a) of the Act reads, "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization."
"

¹⁸Senate Report No. 105, 80th Congress, 1st Session, on S. 1126.

agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity.”

The Conference Report¹⁹ from the House and Senate Conferees noted the following with respect to the effect of this clause (page 60):

“Section 14 of the Senate amendment contained a provision to the effect that nothing in the act was to be construed so as to prohibit supervisors from becoming or remaining members of labor organizations, but that employers should not be compelled to consider individuals defined as supervisors as employees for the purposes of any law, either national or local relating to collective bargaining. There was nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization, and the first part of this provision was included presumably out of an abundance of caution.”

Thus, it is clear that the first clause of Section 14(a) was inserted “out of an abundance of caution,” and not to permit the Board to hold that supervisors are given *retroactive* protection for “unprotected” activity. Congressman Hartley, co-author of the Act, made the following statement on the floor of the House on April 15, 1947, in connection with debate on this part of the bill:²⁰

“In other words, this bill does not bar them [supervisors] from organizing but they cannot obtain the benefits of the act.”

¹⁹House of Representatives Report No. 510, 80th Congress, 1st Session, on H. R. 3020.

²⁰93 Cong. Rec. 3522.

The minority members of the Senate Committee recognized that Section 14(a) did not do what the Board would now infer that it does.²¹ While opponents' views and statements ordinarily may not be persuasive as to legislative intent, the following quotation is significant because it is a part of a report filed by members of the committee which drafted the legislation, and the statement was never denied during the very lengthy debates on the subject (p. 39):

"We find seriously objectionable the complete exclusion from the procedures and protections of the act of supervisors as a class. The beguiling statement of principle in section 14 that recognizes their natural right to self-organization and self-help is made meaningless by the removal of the legal sanctions that give vitality and substance to that right."

The Board, as already noted, admits that the Act no longer accords "affirmative protection" to supervisors for union or concerted activities; but, the Board then announces another of its fanciful and meaningless phrases coined for this decision, *i. e.*, ". . . to say that such activities are no longer accorded affirmative protection is not to say they are tainted with illegality" [R. 45]. The decision cited the *Edward G. Budd* case, *supra* [R. 45, Note 25] in connection with its admission that "affirmative protection" has been removed from supervisors. We are unable to understand if the Board means by this that "negative protection" still exists, or just what it does mean by "affirmative protection." The court said in the *Budd* case (p. 575) that both *affirmative* and *negative* sections of the order were to be considered under the remand from the Supreme Court (*Edward G. Budd Mfg. Co.*

²¹Senate Report 105, Part 2 (Minority Views), 80th Congress, 1st Session.

v. N. L. R. B. (1947), 332 U. S. 840, 68 S. Ct. 262, 92 L. Ed. 412), and the court vacated both the affirmative and negative parts of the order.

There is certainly no comfort for the Board to be found in the *Budd* case as to any of its theories in this case. The court said, for example (p. 579 of the Federal Reporter):

“We believe it is clear that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. The cease and desist provisions of the Board’s order would enjoin the respondent from engaging in conduct in the future which is now lawful. They should, accordingly, be set aside.”

The court refused in the *Budd* case to enforce an order issued *prior* to passage of the supervisor amendments. Here, where the conduct occurred *after* the amendments, the fruition of the intent and purpose of the statute requires that the order of the Board be refused enforcement, because the Board’s order effects the emasculation of the disabling amendments as to supervisors.

D. The Board Erroneously Converted Cody’s Status From That of “Nonemployee” to That of “Employee.”

Since the Board premises its order in this case upon its conclusion that Cody was an “employee” on November 16, 1948, because “he was no longer ‘employed as a supervisor’ ” [R. 46], we examine below the *Phelps-Dodge*²² holding on which the Board relied for this con-

²²*Phelps-Dodge Corp v. N.L.R.B.* (1941), 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271.

clusion. While Petitioner's case does not stand or fall depending on whether Cody was an "employee" on the date in question, we cannot let the Board's conclusion on that matter go unchallenged. Clearly, there are a number of material facts which distinguish this case and the *Phelps-Dodge* case. These distinctions remove the latter case as an authority for any finding or conclusion in this case.

First, the Supreme Court said that the question before it in the *Phelps-Dodge* case was "whether an employer . . . may refuse to hire employees solely because of their affiliations with a labor union" (p. 181). The refusal to rehire in that case was prompted by a condition (union affiliation) that existed at the time of the refusal to hire. Such is not true here.

Second, the court had before it a question as to whether the definition of "employee" in Section 2(3) of the Wagner Act excluded strikers who had obtained "substantially equivalent employment." Here the question is whether one who is specifically excluded from the "employee" definition comes under it after he has been discharged.

As to the first question, the case involved an order by the Board for Phelps-Dodge to re-employ two individuals who had been discharged before the effective date of the Wagner Act (July 5, 1935), and who had been refused re-employment *after* the law became effective, admittedly "because of their affiliations with the Union" (pp. 181-182 of the U. S. Reports). The court considered carefully the broad purpose of the Wagner Act and the historical development of labor unions' struggle to afford employees a vehicle for self-organization and collective bargaining (pp. 182-183). The court noted that self-organization could be thwarted as effectively by refusing to hire union members as by discharging them. So, the court ruled that Phelps-Dodge could be ordered to rehire

these individuals because the broad purposes of the statute dictated that employers could not refuse to hire because the applicant was a member of a union.

As to our case, union membership or activity did not enter into the decision not to re-employ Cody. The Trial Examiner specifically so found [R. 73], and the Board inferentially adopted his finding by holding that the "cause" which led to the refusal to rehire Cody was that he made "common cause" with the strikers while he was a supervisor.

In the *Phelps-Dodge* case the court was presented with the question of whether an applicant could be denied employment because of a condition which coexisted with the refusal. As to our case, the Board found that the refusal to rehire amounted to a violation because of something Cody did when he admittedly was *not* an employee, and not because of something he did while he *was* an employee or a condition that existed when he applied for employment. The Board here would make the statute an *ex post facto* law. There is nothing in the *Phelps-Dodge* language authorizing retroactive application so as to make admittedly "unprotected" activity become "protected." These are material and important differences in the two cases.

As to the second question, the *Phelps-Dodge* case does not dispute that the present definition of "employee" precludes the Board from ordering the former employer of a discharged supervisor to rehire him. The court had before it in that case the question as to whether the definition of "employee" prohibited reinstatement of those who had obtained "substantially equivalent employment" (p. 189). In that connection the court found that these applicants for reinstatement were members of the "general class, 'employees'" and that nothing in the definition specifically excluded them. Said the court, "To circumscribe

the general class, 'employees,' we must find authority either in the policy of the Act or in some specific delimiting provision of it" (p. 191). As the law is now written, there is not only authority but also a requirement for circumscribing "the general class 'employees,'" because of both "the policy of the Act" and a "specific delimiting provision of it." The general policy with respect to supervisors and the specific delimiting provisions in Section 2(3) of the Act have been discussed above.

The Court of Appeals for the District of Columbia considered the *Phelps-Dodge* case in a recent decision in connection with a "specific delimiting provision" of the Act.²³ The same proposition was urged before the court in the *Di Giorgio* case as is being argued by the Board in its decision in this case. The court described the argument in the former case as follows:

"The contention is that . . . while the strikers were employed as agricultural laborers they were not included as employees under the Act, but that when they ceased to work as the result of the labor dispute they placed themselves within the terms of the Act."

The Board makes the same contention in this case as to supervisors by arguing that Cody became an employee "when he ceased to work," because he was at that time "no longer 'employed as a supervisor'" [R. 46]. In the *Di Giorgio* case the court had the following to say concerning this argument:

"The essence of the construction urged—that while at work these laborers are not employees but when not at work they are employees—is too contradictory of terms to be adopted without some compelling evi-

²³*Di Giorgio Fruit Corp. v. N.L.R.B.*, *supra*.

dence of that meaning. For us to write that view into the present law would be to add something of major import which we cannot find already there.”

The Board does not in our case dispel this contradiction by any “compelling evidence of that meaning.” Yet the Board urged the contradiction by contending that Cody was an “employee” when he was “no longer ‘employed as a supervisor.’” There is nothing in the Congressional reports, the hearings, or the debates on the legislation which would argue even in a slight degree for such an interpretation. The fact is, as we have noted, that the Board has attempted to perform a legislative function in its decision in this case. The court reminded the proponents of this theory in the *Di Giorgio* case that Congress is the proper forum for such an argument, when it said:

“The argument represents a supportable view which would be valid as a legislative policy and valid if incorporated in a statute, but we do not find in this statute or in its legislative history any indications that it was a policy which motivated Congress when the statute was enacted.”

So, the Board’s utter disregard of the change in the statute between the date of the *Phelps-Dodge* case and the present one is a fatal error. While a discharged supervisor might be an “employee” under the facts of the *Phelps-Dodge* case, that cannot give comfort to the Board in its argument that the “delimiting provisions” of the Act’s definition of “employee” may be ignored. If the Board had found that Cody was refused reinstatement because he was at the time of refusal a member

of the union, we would have before us a far different case. But when the Board makes an *ex post facto* law of the statute, as it would do here, it is going far beyond the doctrine of the *Phelps-Dodge* case. Likewise, the reasoning of the *Di Giorgio* case cannot be overlooked in view of the *specific* “delimiting provision” in the definition of “employee.”

E. The Board's Decision Is in Conflict With Other Board and Court Decisions.

We have already noted that in writing supervisors out of the Act entirely, Congress was motivated in part by the vacillation of the Board²⁴ which left unions, employees, and employers uncertain from year to year. The majority decision in the instant case would lead one to believe that even after the passage of the amendments to the Act, the Board intends to persist in its practice of “blowing both hot and cold.” In 1949, not long after the court spoke so forcibly in the *Budd* case, *supra*, as to the lack of protection for supervisors under the amended Act, the Board issued its decision in the *Alabama Marble* case, *supra*. In this case one question was the alleged discriminatory refusal to rehire a supervisor who was a member of and participated in a strike by the union—in fact, he was the picket-line captain. The Trial

²⁴*Union Collieries Coal Co.* (1942), 41 NLRB 961, 44 NLRB 165 (foremen may organize in an independent union); *Godchaux Sugars, Inc.* (1942), 44 NLRB 874 (foremen may organize in an affiliated union); *Maryland Drydock Co.* (1943), 49 NLRB 733 (no unit appropriate to the organization of supervisory employees); *Packard Motor Car Co.* (1945), 61 NLRB 4 (foremen are employees and therefore may organize and receive the protection of the statute).

Examiner held that “the logic of the *Budd* case applies with equal force to the present case . . .” (83 NLRB at p. 1074). The Board affirmed the Trial Examiner’s ruling on the same grounds (at p. 1049). In another case decided in 1949,²⁵ the Board stated that the employer “had a right to warn his foreman against participating in the union activities of the rank and file,” and said that the employer could have disciplined the foreman if it had so desired. In our case, however, the Board rests its legal conclusion of a violation squarely upon the Petitioner’s refusal to rehire Cody because of his “participating in the union activities of the rank and file.” One would conclude, therefore, that the same employer conduct which was permissible in 1949 decisions is unlawful in a 1951 decision, despite the fact that both decisions were rendered under the same statute.

Early in 1950 the Board ruled that a certain group of workers “were supervisors and, as such, outside the protection of the Act.” (*Florida Telephone Corporation* (1950), 88 NLRB 1429, 1431.) The Board followed the same line in February of that year²⁶ and again in July when it affirmed the following ruling of the Trial Examiner:²⁷

“It is amply clear from the legislative history of the Act as amended, that when the Congress excluded supervisory employees from the protection of the Act, it thereby intended that supervisors should be with-

²⁵*El Dorado Limestone Co.* (1949), 83 NLRB 746, 748.

²⁶*Pacific Gamble-Robinson Co.*, *supra*.

²⁷*Accurate Threaded Products Co.*, *supra*.

out remedy when discharged or otherwise penalized by their employers for engaging in organizational activities. It was specified in the Senate Report on this subject (Senate Report No. 105 on S. 1126, 80th Congress, 1st Session) that this was so whether the organizational activity of the supervisors so penalized consisted of activity on behalf of a rank-and-file employees' organization, as here, or one composed solely of supervisors.

"To predicate a finding of unfair labor practices upon an employer's conduct in penalizing union activity by one of his supervisory employees, in view of the foregoing, seem to be squarely in conflict with the congressional intent" (p. 1373).

In the case just quoted the foreman in question had been discharged and not re-employed "because of his activities and membership in the union of . . . production and maintenance employees" (p. 1368).

In the *Pacific-Gamble* case, the Board affirmed the Trial Examiner's ruling that a supervisor *who had participated in a rank-and-file strike* was not entitled to reinstatement. The Board said (p. 485, note 14):

"Because we agree with the Trial Examiner that Webber is a supervisor, to whom Congress has denied the protection of the amended Act, we find that the Respondent did not engage in any unfair labor practice with respect to him."

The Board went one step further in a case decided in August of 1950,²⁸ wherein it ruled that statements amounting to interference, restraint, and coercion in violation of 8(a)(1) of the Act were not illegal when made to an

²⁸*Pure Oil Company* (1950), 90 NLRB 1661.

individual who served as a supervisor only one day each week. Said the Board (pp. 1661-1662):

“Carder, although employed primarily in a rank and file capacity, regularly relieved Gang Foreman Hatch 1 day each week. On these occasions he performed the usual functions and exercised the customary authority of a gang foreman, a position which the parties stipulated is supervisory. We find, therefore that because of his regular and frequent employment as a gang foreman, Carder was a supervisor at the time the above statements were made. Accordingly, we conclude that the Respondent was privileged to inquire as to his union affiliation and to insist as a condition to Carder’s continued employment as a supervisor that he relinquish his membership in the Union.”

In a more recent case²⁹ (June, 1951), the Trial Examiner found that one Lee Collester had been discharged and not re-employed because of his union activity. But the Board ruled that Collester was a supervisor within the meaning of the Act and, therefore, found that the discharge was not violative of the Act.³⁰

²⁹*Palmer Manufacturing Corporation, supra.*

³⁰The Board took notice of the legal requirement for supervisors to abstain from union activity, stating as follows:

“As Collester assisted in obtaining membership cards from some of the employees, a question may arise as to whether or not the Union represented an uncoerced majority on September 16, 1950.” (Page 3 of mimeographed decision (D-5166) released June 29, 1951.) See also Point II.

A case released by the Board on July 2, 1951,³¹ affirmed all of the rulings, findings and conclusions of the trial examiner who had recommended dismissal of a complaint because the alleged discriminatee was a supervisor. The supervisor, Earl A. Staiger, joined with rank-and-file employees to get a union organizer to enlist members in the union because of a new wage policy which resulted in less "take-home" pay for all employees as well as Staiger. The employer discharged Staiger for this "concerted activity" with rank-and-file employees. The trial examiner said (p. 3 of intermediate report [IR 450] attached to mimeographed decision):

"If on this issue the Respondent is right [that Staiger was a supervisor] and the General Counsel wrong, it would follow that no unfair labor practice finding may be predicated upon the Respondent's discharge of Staiger. For, as the Board has ruled under analogous circumstances, the discharge of a supervisor for organizational activities on behalf of a rank-and-file union violates neither Section 8(a)(3) nor Section 8(a)(1) of the Act."

The reasoning and the conclusions reached in the above cases are fundamentally sound in logic and in absolute harmony with the provisions and purposes of the Act, but they are diametrically contrary to the reasoning of the three-man majority in our case. They are, however, representative of our position here. We discuss more fully under Point III our further arguments that

³¹*Tri-Pak Machinery Service, Inc., supra.* See also discussion of this case under Point III, *infra*.

the refusal to employ Cody cannot be held to discourage membership or activity in a labor organization.

As this Court said in the *Wells* case, *supra*, at page 460:

“There are more subtle, less perceptible ways by which a supervisory employee, with authority to hire and discharge, to promote and demote, may influence choice as between competing unions, or as between union and no union.”

If the Board's majority decision in this case is permitted to stand, members of industry once again will find themselves at the mercy of the Board even if one should discharge and refuse to rehire a vice president because he refused to obey orders due to his union sympathies. There will be no way to compel neutrality by foremen.

It is submitted that a review of the above-cited Board cases, decided during 1949, 1950 and 1951, and a comparison of them with the decision of the majority in this case will prompt one to make the same remark as did the Supreme Court in the *Packard* case, *supra*, where it said at page 492:

“If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark.”

All of the foregoing demonstrates that the Board's decision in this case violates the provisions and thwarts the purposes of the Act as it relates to supervisors. The Board should not be sustained in its program of inconsistent application of the provisions of the Act.

POINT II.

Cody Did Not Engage in “Concerted Activity” Within the Meaning of Section 7 of the Act; nor Did He Make “Common Cause” With the Striking Employees.

The Board found that the “cause” of Cody’s refusal of employment was his “concerted activity” [R. 46-47], and the complaint alleged likewise [R. 8]. Therefore, if Cody did *not* engage in “concerted activity” within the meaning of Section 7 of the Act, the Board’s order cannot be sustained. (*N.L.R.B. v. Illinois Bell Telephone Co.* (C. A. 7, 1951), 189 F. 2d 124.) Section 7 provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

The Board based its conclusions of violations upon its finding that “The refusal by Cody as a supervisor to perform rank-and-file work of strikers was concerted activity of a type which was protected under the Wagner Act” [R. 45]. We do not agree with this finding, but assuming *arguendo* that it is correct, it is, as noted in the dissenting opinion, immaterial whether Cody’s action would have been “concerted activity” under the Wagner Act, because that Act was not in effect at the time of his activity. The question here is whether his activity was within the provisions of Section 7 of the Act (in effect at the time of his conduct), and was thus “immunized against reprisal” [R. 55].

A. Cody's Activity Was Not "Concerted."

An analysis of the undisputed facts in this case reveals unmistakably that Cody's activity was not "concerted." The reasoning of the court in the *Illinois Bell* case, *supra*, is applicable to the situation here. In that case the court held that a refusal by eight individuals to cross a picket line established by a union which did not represent them did not amount to "concerted activities" for "mutual aid or protection"; and that, therefore, there was no protection afforded by Section 7 of the Act. The Trial Examiner in the *Illinois Bell* case found that the eight employees "made common cause with those engaged in the economic strike . . ." In the instant case the Board found that Cody "was refused employment solely because he had, in the past, made common cause, in a manner which was not unlawful, with protected concerted activity by the rank-and-file union" [R. 48]. With respect to the question of making "common cause," the court said in the *Illinois Bell* case, "We think it is a novel theory that the mere refusal to cross a picket line . . . makes the one who refuses a party to the strike, but even so . . . such refusal was not for the 'mutual aid or protection' of the employees involved."

In the Cody case there is even less indicia of "concerted activity" than in the *Illinois Bell* case. Cody did not refuse to cross a picket line. In fact, he was willing to "haul" another "person and let him do the work" [R. 110, 189-190]. Cody did not act in combination or concert with anyone else. The Board reasons that he made

“common cause” with the strikers because he refused to perform a particular task assigned to him on September 28. This is a pure and simple conclusion, the meaning of which is not explained; and there is no evidence to support such a conclusion. Cody did not give as his reason for refusing to do the job assigned that he wished to aid or make “common cause” with the strikers. The fact is that when Superintendent Dreyer told Cody that he must decide which team (management’s or the Union’s) he would be on, Cody replied, “Can’t I be on a team of my own?” [R. 319]. There is no resemblance to “concerted” action which may be inferred from that. The fact is that Cody refused to do the particular job for *personal* reasons. He said that he “wanted no part in the operation” [R. 196]; he said that he “had an actual fear of what would happen” to his family and home [R. 197]. No one connected with the Union or the strikers had spoken to Cody about the type of work he should or should not do [R. 188]. Cody alone set the standards by which he would work behind the picket line. He did “patrol” lines, which was done by gaugers who were on strike [R. 106-107], but he would not deliver strappings [R. 195] or run tickets [R. 67, 107, 179-183, 195-196]; he did report on number of pickets at certain locations, the wells which were pumping, and if tanks were ready to receive [R. 305-309], but he would not gauge and sample Yorba Linda Station [R. 110-111, 188-189, 318]. All of this is positive evidence that Cody’s conduct was “individual” and not “concerted” action. On September 28 he forced his superior to give him an “order” and then flatly refused to obey on a strictly individual and personal basis [R. 108-111, 195-197].

In noting that there was no “concerted” action in the *Illinois Bell* case, the court gave the following description, which is wholly fitting to our case:

“There is no evidence that these eight employees acted in combination or concert. They did not converse with each other or any other person regarding the activity in which they engaged . . . each acted in her own individual capacity.” (P. 127.)

It cannot be disputed that Cody acted in his “own individual capacity,” and the Board’s finding that he engaged in “concerted activity” is wholly without foundation in fact, is not supported by substantial evidence, and is contrary to Cody’s own testimony.

Since there is no evidence that Cody engaged in “concerted activity,” but undenied evidence that it was *individual* action, the Board’s conclusion is erroneous and its order is not sustainable, because Cody’s action is *not* the type protected by Section 7 of the Act. The following quotation from the Board’s decision in the *Panaderia Sucesion Alonso, et al.* (1949), 87 NLRB 877, 880 is appropriate in this case as it was there:

“Because Section 7 grants rights exclusively to ‘employees,’ any concerted activity must be that of more than one ‘employee’ in order to obtain the protection of Section 7.”

To go one step further, “concerted activity” between Cody and the strikers cannot exist, because the Board admits that Cody was not an “employee” when he engaged in his activity in question. Therefore, the fol-

lowing rule of the Board prohibits a finding of concerted activity (*Panaderia, supra*, p. 880):

“We do not believe that one ‘employee’ and non-employees together may engage in protected concerted activities within the meaning of the Act.”

Conversely, the rule is just as compelling if there is only one nonemployee and several “employees.”

That the term “concerted activity” used in the Act has a prescribed meaning and cannot be used loosely as the Board did in this case is clearly established by the Supreme Court in the *International Rice Milling* case.³² The court had before it in that case the question whether the union induced or encouraged employees to engage in “a concerted refusal” to perform work. The court found that the picketing “did encourage two employees . . . to turn back from an intended trip to the mill . . .”; but, said the court, the Act “contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets’ request to a driver of a single truck to discontinue a pending trip to a picketed mill.” The court pointed out that inducements to individual employees “generally are not aimed at concerted, as distinguished from individual, conduct by such employees.” Just as there was no evidence in that case that there was inducement to “concerted” action, there is no evidence here that Cody’s action was “concerted.” On the contrary, the evidence is uncontradicted that Cody acted *on his own* by refusing to perform a particular task that was personally objectionable to him.

³²*N.L.R.B. v. International Rice Milling Co.* (1951), U. S., 95 L. Ed. 777, 19 L. Wk. 4357.

B. Cody's Activity Was Not for "Mutual Aid or Protection."

Now, assuming *arguendo* that Cody's action was in "concert" with the strikers, the test of Section 7 of the Act still is not met because it could not be for "mutual aid or protection." In the *Illinois Bell* case, *supra*, the court said (pp. 127-128):

"Assuming, however, contrary to what we think, that the involved employees engaged in 'concerted activities,' we are unable to discern from this record . . . how it can be held that such activities were for their 'mutual aid or protection.' They neither sought nor were entitled to seek on their own behalf any aid or protection from respondent."

That precise situation prevails in the Cody case. He did not seek anything from the Company, and he was not "entitled" to so seek, because Section 2(3) of the Act specifically excludes Cody as a supervisor from the definition of "employee." As a nonemployee he was not entitled to any protection of the Act and he could not do any of the things described as protected activities in Section 7. Moreover, just as employees and nonemployees cannot engage in "concerted activities" together, *a fortiori* they cannot join together for "mutual aid or protection" because there cannot be any *mutuality* of interest in union or collective bargaining matters. The Board always excludes supervisors from bargaining units, and has even gone so far as to find that labor unions are incapable of serving as the representative of employees if supervisors

participate.³³ In the *Wells* case the Board found that the union did not represent an *uncoerced* majority because a supervisor had campaigned and obtained members for the union. When the Board ignores the anomalous situation which obtains when it finds that a supervisor may engage in activities described in Section 7 of the Act and at the same time holds that such activities can destroy a union's representative capacity, it is shutting its eyes to the fundamental purpose of the statute which it was created to administer. Since Cody was not an "employee," since he had none of the rights described in Section 7 of the Act, and since the law precludes it, he could *not* engage in activities with "employees" for their "mutual aid or protection" within the meaning of the section. Therefore, even if he had acted in "concert" with the strikers, the action would not have been for "mutual aid or protection."

We are not disagreeing that, as the Board argued [R. 45], supervisors might be found to have acted with other employees for their mutual interest at a time when the former were included as "employees" under the Act. (*Packard Motor Car Co. v. N.L.R.B.* (1947), 330 U. S. 485, 67 S. Ct. 789, 91 L. Ed. 1040.) But in the *Packard* case foremen joined with foremen—not with employees supervised by them. It is because of this anomaly that, under the Act as it existed at the time of Cody's conduct and as it exists today, supervisors are excluded from the "employee" definition. (See Point I, *supra*.)

³³*Toledo Stamping and Mfg. Co.* (1944), 55 NLRB 865; *Alaska Salmon Industry, Inc.* (1948), 78 NLRB 185; *Palmer Mfg. Corp.*, *supra*. In the last case, the Board sustained the discharge of a supervisor who had aided the union; it did not find it necessary to resolve the question of whether the union represented an uncoerced majority, because the refusal to bargain charge was dismissed for other reasons. See, also, *Wells, Inc.* (1946), 68 NLRB 545, enforcement denied (C. A. 9, 1947), 162 F. 2d 457.

C. Cody Did Not, nor Could He Legally, Make "Common Cause" With the Strikers.

The Board theorized that Cody "made common cause" and that he acted "in aid . . . of . . . rank-and-file employees" [R. 48, 49], all of which constituted activity described in Section 7, and for which he had the protection of the Act. The Board reached this farfetched and meaningless conclusion despite the lack of supporting evidence. Not only that, but it also ignored the absence of "concerted" action and non-existence of "mutuality" of interest, as well as the absolute incompatibility of supervisors and employees in the eyes of the Act. Moreover, the Board disregarded the requirement that to remain neutral an employer must forbid union activity by supervisors; and an employer is held in violation of the Act if his supervisors make "common cause" or act "in aid" of his rank-and-file employees.³⁴ This court pointed out in the *Wells* case, *supra*, that the Board cannot "have it both ways" (p. 460). If the Board's theory in this case is permitted to prevail, that exactly would be the result—a foreman would be protected against reprisal for conduct which is a violation of the statute and which would jeopardize the bargaining rights of a union.

But the same law which penalizes a union and an employer alike if the latter's supervisors make "common cause" or act "in aid" of his "employees," certainly does not protect those supervisors from "reprisal" for such activity. As noted in Point I, *supra*, the Congress changed the statute so as to correct this anomalous situation which

³⁴*T. B. Martin, et al., d/b/a Standard Feed Milling Co.*, 94 NLRB No. 191, June 18, 1951, where an employer was held accountable for unauthorized statements by a supervisor. *Otis L. Boyhill Furniture Co.* (1951), 94 NLRB No. 232, where an employer was held in violation of the Act because a supervisor who was a member of the union favored other union members. See *N.L.R.B. v. Bird Machine Co.* (C. A. 1, 1947), 161 F. 2d 589, 591.

prevailed under the Wagner Act, and the Board should not be permitted to flout the Congressional intent. If a supervisor is wholly unprotected by the Act for union or concerted activity, and this is admitted by the Board [R. 46], he may not thereafter don the cloak of protection defined in Section 7, simply because the activity would have been protected under other and different facts. The test of protection is to be applied to the activity based on the facts as of the time of occurrence. Section 7 protects “employees” in certain activities, but it does not provide that activities *not* protected when they happen may later *become* protected by changed circumstances.

Therefore, even if there were evidence to support the conclusion that Cody engaged in “concerted” activity, and that he made “common cause” with, and that he acted “in aid” of the striking employees, the conduct in question clearly is not that which is “immunized against reprisal” [Dissenting Opinion, R. 55].

The Board’s conclusion that Cody’s act of insubordination is protected by Section 7 is contrary to the evidence and the law because:

1. There was no “concerted activity”;
2. There was no activity for “mutual aid or protection”;
3. Cody did not nor could he legally make “common cause” with the strikers;
4. Cody could not engage in acts described in Section 7 because he was not an “employee”;
5. The law affords no protection to supervisors’ activities in union and collective bargaining matters; and, more than that, the law penalizes employers and unions for supervisors’ union activities.

POINT III.

The Refusal by the Petitioner to Employ Cody Did Not, nor Could It Be Inferred That It Would, Discourage Membership of Employees in a Labor Organization Within the Meaning of Section 8(a) (3) of the Act.

The Board ruled that Petitioner violated Section 8(a) (3) of the Act by refusing to re-employ Cody on and after November 16, 1948 [R. 44]. This section of the Act makes it an unfair labor practice for an employer

“ . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”

In support of its ruling, the Board said that the “refusal necessarily discouraged membership in . . . the labor organization involved . . .” [R. 49], and “. . . we think that membership in the rank-and-file union was palpably discouraged . . .” by the refusal [R. 47, 48]. It is to be noted that the Board’s finding above is based entirely upon an assumption that the refusal *necessarily* discouraged membership and that the Board *thinks* it did. There is not even any pretense that evidentiary support exists, much less that there is “substantial evidence on the record considered as a whole” (Section 10(e) of the Act).³⁵

The Board agreed that “the amendments [Section 2(3) of the Act] privilege the . . . discharge” of Cody [R. 46], and that Petitioner refused to re-employ him because he refused to perform assigned work at a time when he was not an “employee” [R. 48-49]. Thus

³⁵*Universal Camera Corp. v. N.L.R.B.* (1951), U. S., 95 L. Ed. 298, 19 L. Wk. 4160.

we are presented with this situation: (1) Cody refused to do *certain* work normally performed by employees who were then on strike; (2) he was legally discharged for this refusal; (3) he was later denied re-employment because he had so refused. On these facts, and supported only by the conclusion that Cody's action was "in aid" of "rank-and-file" employees,³⁶ the Board jumped to the conclusion that the refusal to re-employ him "necessarily discouraged membership in, and concerted activity on behalf of . . ." the Union. The latter conclusion is based upon the former conclusion; the former conclusion was based upon an inference not supported by evidence and is contrary to the law. (See Point II, *supra*.)

There is no process of logical reasoning by which one can conclude that the refusal to rehire a supervisor discharged for legitimate and legal reasons "necessarily discouraged membership" in the Union of the rank-and-file employees. This is ably and logically discussed by the Trial Examiner [R. 74-75] and by the dissenting members of the Board [R. 56-57].

A. If Any Discouragement of or Interference With Union Membership Were Occasioned by the Discharge of and Refusal to Employ Cody, It Would Be Permissible Under the Act.

Let us analyze the theory upon which the Board has always drawn an inference, in the absence of clear evidence, that discrimination has the effect to "discourage" membership in a union. The Board's reasoning is that the discriminatory treatment constitutes a warning to other employees not to do the same thing the discriminatee did. For example, if one who is a member of or active in

³⁶See Point II, *supra*, for our discussion that this conclusion is erroneous.

a union is discharged therefor, the Board reasons that the natural consequence is to discourage others from such membership or activity.³⁷ There must, however, be a *direct relationship* between the activity causing the discharge or other discrimination and the activity found to be discouraged. Clear proof is not required that a discrimination *actually* discouraged membership and activity, *if* the status and activity of the discriminatee is akin to the status and activity of employees who are found to have been discouraged.³⁸ In the *Pennsylvania Greyhound* case, *supra*, the Board said (p. 38), "It is not necessary to discharge every union member to discourage union membership or to break a union." There the Board meant that the discharge of one member would serve as a warning to other members. Where courts have been presented with the precise question as to whether there is substantial evidence to support an inference that union membership was discouraged, they have examined the entire record, including the presence or absence of anti-union bias.³⁹ Where, as in this case, the Board finds that there

³⁷In the first decision rendered by the National Labor Relations Board, *Pennsylvania Greyhound Lines, Inc.* (1935), 1 NLRB 1, the Board sounded the keynote of the rationale by which it concludes and courts agree that discrimination discourages membership and activity in a union. There the Board said (p. 35), "They [the discharges] would have a two-fold effect—they would not only immediately affect the discharged employees but would also discourage other employees from joining or remaining members of . . . [the union]." The Board went on to say two sentences later, "But the above employees chosen as examples were chosen because of their union membership."

³⁸*N.L.R.B. v. Walt Disney Productions* (C. A. 9, 1944), 146 F. 2d 44, 49, wherein this Court held that discouragement "may reasonably be inferred from the circumstances of the discharge . . ." See also *Stonewall Cotton Mills, Inc. v. N.L.R.B.* (C. A. 5, 1942), 129 F. 2d 629, 632.

³⁹*N.L.R.B. v. Air Associates, Inc.* (C. A. 2, 1941), 121 F. 2d 586, 592.

is no evidence “indicative of an anti-union animus on the part of the Respondent (Petitioner), now or in the past” [R. 38]; where the Board is unable to find that Petitioner was “motivated” by a purpose to violate the law [R. 47]; then, there must be some *reasonable basis* for concluding that Petitioner’s action “discouraged membership” in the Union. Most assuredly, the usual basis for such conclusions by the Board is not present here, because Cody’s conduct which prompted the Petitioner to discharge and refuse to rehire him admittedly was not protected under the Act.

In the *Pacific Lumber Co.* case,⁴⁰ the Board alluded to the legislative history of the Wagner Act in this connection, but a reference to the reports, hearings, and debate on that Act reveals that Congress found that employers used the device of discharge and other discrimination “to discourage” *other* employees in the *same status* as the discriminatee from joining or participating in union activity. It was this practice that Congress was aiming at when it wrote Section 8(3) in the original Wagner Act. In the *Pacific Lumber* case, *supra*, the Board noted “that *normally* the discharge of an employee because of his union membership or activity necessarily results in discouraging union membership . . .”(*Emphasis added.*) The facts of this case and the situation presented are not, however, “normal,” but rather involve “novel circumstances” [R. 51]. Thus, the Board has applied its doctrine for *normal* situations to an admittedly *abnormal* one.

⁴⁰*Pacific Lumber Co.* (1943), 49 NLRB 1145, 1146.

As noted above, the theory upon which the Board may “infer” that union membership is discouraged is that the discrimination holds up the discriminatee to other employees as an “example” of what may happen to them if they do the same thing that the discriminatee did. Since the Board has found that the conduct for which Cody was denied re-employment was done at a time when he could be discharged therefor, at a time when he was a supervisor and a member of management, and at a time when he was not even an “employee”; then, the conduct which would be discouraged by the refusal to rehire is *union activity by a foreman* (assuming, without admitting, that Cody engaged in union activity as envisaged by the Act). But, discouraging the union activity of a foreman is permissible, and it cannot be violative of Section 8(a) (3), or any other part, of the Act.⁴¹ That the Board erred in reaching the legal conclusion that union membership and activity by rank-and-file employees was discouraged in this case is demonstrated by the rationale of the *Tri-Pak* case, *supra*. In the latter case the trial examiner ruled, with Board approval, that interference with the rights of, and discouraging membership and activity in a union by, rank-and-file employees cannot flow from the interference with a supervisor’s union activity. The trial examiner said in that connection (page 3 of intermediate report attached to mimeographed decision of the Board):

“If on this issue the Respondent is right and the General Counsel wrong, it would follow that no un-

⁴¹*N.L.R.B. v. Edward G. Budd Mfg. Co., supra; Tri-Pak Machinery Service Co., supra.*

fair labor practice finding may be predicated upon the Respondent's discharge of Staiger. For, as the Board has ruled under analogous circumstances, the discharge of a supervisor for organizational activities on behalf of a rank-and-file union violates neither Section 8(a) (3) nor Section 8(a) (1) of the Act. . . . The General Counsel, however, adduced no evidence of any threat or warning to employees, other than, perhaps, such threat as might be found implicit in Staiger's discharge, if, but only if, the discharge itself is not immunized by Section 2(11) from the reach of Sections 8(a) (1) and 8(a)(3). There is proof that the Respondent questioned Staiger, as well as others in its employ, about Staiger's organizational activities. But, as the General Counsel concedes, the Respondent's interrogation of Staiger may be found violative of Section 8(a) (1) only if it is found also that he was not a supervisor within the statutory definition."

Let us apply the rule of reason and common sense to the facts of this case and from that approach see what reasonable inference may be drawn as to the reaction of rank-and-file employees to the treatment accorded Cody.

There was a strike, "economic" in nature as distinguished from an "unfair labor practice strike," among the employees of Petitioner [R. 41]. The employees were aware that at the conclusion of the strike, all employees were reinstated to their old jobs if they wanted them [R. 35-36, 345-346]. They knew that the employer (Petitioner) had been dealing with the Union for many years, and there was no evidence of anti-union animus on the part of the Petitioner [R. 38]. During the strike all foremen, including Cody, worked at various jobs with knowledge

thereof to the Union [R. 264, 270-273, 352, 361-362]. After the strike had been in progress for some four weeks, the Petitioner started certain operations and began to accelerate others [R. 263-265]. At that time Cody, who was a part of management with no rights under the Act and who was not an "employee," was asked to perform a particular task which he flatly refused to do. As a result he was discharged. Thereafter, Cody was denied re-employment because he had refused to do certain work during the strike. Employees know that under the Act foremen are a part of management and that they cannot participate in union affairs [R. 169-170, 360]. (*Lily-Tulip Cup Co., supra.*) If we assume for the sake of our argument that Cody's refusal constituted "concerted" action, what is the lesson that other employees will gain from the fact that Cody was refused re-employment? It is simply that if they later become supervisors they must be a part of management as the law intends, and that they must assist the management in the performance of legitimate operations. It is that if there is a strike during which the employer operates its business, they as supervisors must do the work assigned or they will be guilty of "unprotected insubordination" [R. 57], and that when they are insubordinate they can be lawfully refused re-employment in any position for that reason.

Employees and their unions know that a company has the right to operate its business, and that which is described immediately above is the only "lesson" that will be taught by the refusal to rehire Cody. Therefore, by the refusal to rehire Cody, Petitioner has discouraged, if

indeed there is any discouragement, foremen and other supervisors from “making common cause” with the Union, or acting “in aid” of the Union or strikers. There is just no other reasonable conclusion that may be reached, and the Act was amended in 1947 in such a manner as to permit employers to discourage and even prevent supervisors from engaging in just such union activity.

It is noteworthy that the Board did not find that Cody was denied re-employment because of anything he did at the time when it was protected by the Act. To the contrary, the Board found that Petitioner was within its legal rights to discharge Cody. The evil, so found the Board, lies in the fact that Petitioner wanted to *keep* him discharged. Any discouraging effect flowing from the discharge admittedly cannot be remedied, but, said the Board, the discouraging effect which it *thinks* flowed from the refusal to rehire can be remedied. In its attempt to rationalize itself out of this paradoxical position, the Board merely states that if the status of Cody had been different when he engaged in the conduct, he would have enjoyed the protection of the Act. This, we submit, is an attempt by the Board to rewrite the statute by administrative interpretation.

B. The Potlatch Case.

This Court recently considered the matter of what constitutes “discrimination . . . to discourage” membership in a union.⁴² The instant case involves similar principles to those before the Court in that case. Noted below are some of the important similarities:

(1) Here, as was true in the *Potlatch* case, Petitioner “had exhibited no anti-union prejudices . . .,” and the Board so found [R. 38, 47].

⁴²*N.L.R.B. v. Potlatch Forests, Inc., supra.*

(2) This Court noted in the *Potlatch* case, in connection with the Board's inferences, "The only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences . . ."; in this case, the only support for the Board's finding that membership and activity in the Union by "employees" is discouraged is the naked statement that it "necessarily" does so, and the fact that three members "*think*" such is the result.

In this connection, it should be noted that the Board certainly cannot rely upon its so-called "expertness" as support for this subjective opinion—the experts are equally divided here. The Trial Examiner and two members of the Board found that the refusal to rehire Cody did not violate the Act [R. 57, 73]. As noted by the Court in *Wyman-Gordon Co. v. N.L.R.B.* (C. A. 7, 1946), 153 F. 2d 480, 483, ". . . such contrariety of views may be properly taken into consideration, in fact [we think] that it has a material bearing upon the question as to whether the Board's findings are substantially supported."

(3) This Court further noted in the *Potlatch* case, with respect to conclusions as to inevitability, "Such a conclusion is not enough to support the finding of discriminatory motive . . ."; in this case, the Board gives cavalier treatment to the lack of motive "to interfere with and discourage . . . union activity" [R. 47], and ignores the fact that all evidence in the record shows absence of illegal motive [R. 79, 346]. The Board here not only drew an inference upon pure speculation without any evidence to support it, but it also did so in the face of positive evidence to the contrary [R. 38, 47, 55, 66, 73, 100, 170-171].

(4) However, even if we assume that the refusal to rehire Cody had some effect of discouraging union activity, it does not follow that the refusal is *ipso facto* a violation of the Act. This Court pointed out in the *Potlatch* case that an employer does not violate the law by every act which has “a tendency to discourage union activities . . .” and that an employer is within his legal rights to engage in “conduct [that] is regarded as a legitimate weapon of economic warfare.” In the instant case Cody’s conduct was a direct result of Petitioner’s legitimate operations during the strike admittedly for “*bona fide* business considerations” [R. 38]. It was on the day when operations were to be accelerated that Cody refused to perform his assignment. As we have argued in Point I, *supra*, Cody owed his allegiance to management and not to the Union, and he could be expected to perform whatever task was assigned to him.

Since Petitioner was permitted under the Act to operate its business,⁴³ since it had a right to demand that supervisors perform any work assigned,⁴⁴ since Cody’s discharge was permissible [R. 74, 82-84], since he was refused re-employment for the same reason that he was discharged [R. 43-44, 54, 74, 148-149, 321, 332], it follows that Petitioner refused to rehire him because of a “permissible criterion”⁴⁵ [R. 49].

⁴³*N.L.R.B. v. Mackay Radio & Telegraph Co.*, *supra*; *N.L.R.B. v. Potlach Forests, Inc.*, *supra*; *International Shoe Co.*, *supra*.

⁴⁴See Point I, *supra*.

⁴⁵*N.L.R.B. v. Waumbec Mills, Inc.* (C. A. 1, 1940), 114 F. 2d 226.

C. The Panaderia Case.

The Board only half-heartedly and superficially attempts to distinguish the instant case and the *Panaderia* case⁴⁶ [R. 48]. The dissenting members are correct that “the majority’s basic conclusion” is unacceptable [R. 56]. But the Board passes over this point lightly by saying that “the discharge in that case (*Panaderia*) was one which was clearly aimed at the activities of agricultural employees . . .” [R. 48]. There is no difference. The discharge here as well as the refusal to rehire was “aimed at activities” of supervisors. Both agricultural laborers and supervisors are excluded from the “employee” definition in the Act. As noted in the dissenting opinion [R. 56], there is no logical reason for not applying the usual rule that the “incidental effect of discouraging” membership “does not cause . . . privileged conduct to assume the character of an unfair labor practice” [R. 56]. Yet, that is exactly what the Board would do in this case. It agrees that the conduct of discharging was privileged; it agrees that the refusal to rehire was for the same reason as the discharge; but it then orders Cody hired because it *thinks* union activity has been discouraged. The Board would change the character of Petitioner’s conduct from “privileged” to “illegal,” although nothing occurred in the interim to warrant the change. On what theory would the Board do this? Simply because the Board *thinks* the conduct “necessarily” discouraged union activity. The Board attempts to pull itself up by its own bootstraps in an effort to explain this subjective conclusion—it holds that Petitioner could not have done what it did *if* the facts and the law had been different.

Since the finding by the Board that union activity of the rank-and-file was discouraged is based on nothing but an inference, and since it is not a reasonable inference, this Court should not sustain it.

⁴⁶*Panaderia Sucesion Alonso, et al.* (1949), 87 NLRB 877.

POINT IV.

Cody Was Discharged "for Cause" Within the Meaning of the Act; He Was Refused Employment for a "Cause" Which Was a "Permissible Criterion" for Such Refusal Within the Meaning of the Act.

A. The Meaning of "For Cause."

An employer may discharge any individual "for cause" with full immunity from the provisions of the Act.⁴⁷ The term "for cause" is one of art with a definite meaning as it is used in connection with the application of the Act. It may have a different meaning in the parlance of arbitration under a labor contract, or in the opinion of union leaders and members, or in the judgment of an industry personnel director. There has never been any doubt, however, as to what it meant under the Wagner Act and what it means under the present Act. The Supreme Court settled this in the first case it decided under the Wagner Act.⁴⁸ In that case the court said (pp. 45-46):

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for in-

⁴⁷We shall discuss *infra* the effect of the added phrase in Section 10(c) of the Act as amended in 1947, which provides "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

⁴⁸*N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.

terference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.”

In a companion case at that time,⁴⁹ the court said (p. 132):

“The act does not compel the petitioner to employ anyone . . . The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees . . . The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.”

Thus it is that the Supreme Court has said that an employer may discharge or refuse to hire for any reason, good or bad, so long as it is not prohibited by the Act. That is “for cause.” The Court of Appeals for the Fifth Circuit stated it as follows (p. 632):⁵⁰

“An employee, though he belongs to or is an officer of a union, may, like any other employee, be discharged for any reason or for no reason at all, unless it is for a reason *prohibited by the Act.*” (Emphasis added.)

The question presented in our case is much easier and simpler than the usual case, because here the Board agrees that the discharge of Cody was privileged [R. 46], *i. e.*,

⁴⁹*The Associated Press v. N.L.R.B.* (1937), 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953.

⁵⁰*Stonewall Cotton Mills, Inc. v. N.L.R.B.*, *supra*.

it was “for cause.” The only question, then, is whether the refusal to *rehire* him was privileged, *i. e.*, was it “for cause”? We discuss Cody’s case, therefore, as one of an individual who has been discharged “for cause” and is seeking re-employment. Upon seeking to be rehired, he was refused for the same “cause” that prompted his discharge. This, too, is admitted [R. 46-49, 54]. But, says the Board, that which was privileged conduct by the Petitioner when it discharged Cody lost its privileged character when Cody sought re-employment. The Board reaches this conclusion because, in its interpretation of the Act, Cody became an “employee” after he was discharged. Then, reasons the Board, he can be ordered reinstated to any rank-and-file job which was open, even though he was discharged “for cause”—that is, for activity which was not protected under the Act. If Cody had been an employee when he engaged in the activity, he would have enjoyed the protection of the Act, says the Board; therefore, since the Board claims he was an “employee” when he asked for “a job back” [R. 153, 200, 207], it says Cody’s activity must be viewed in the light of his status at the time of application instead of at the time he engaged in the activity. There is nothing in the law, the decisions thereunder, or in the legislative history of the Act to warrant the Board’s indulgence in these inferences based upon hypotheses and speculation.

We do not wish to argue here the question as to whether the *Phelps-Dodge* case⁵¹ stands for the proposition that any discharged individual thereafter becomes an “employee” under *all* circumstances. As we have noted

⁵¹*Phelps-Dodge Corp. v. N.L.R.B., supra.*

in our argument under Point I, *supra*, the *Phelps-Dodge* case is limited in its ruling. For the sake of a part of our argument under this point, however, we shall assume that Cody was an “employee” on and after November 16, 1948, for the limited purpose of enjoying an immunity against reprisal for union membership or activity obtaining at a time when he was under the Act’s coverage. But we certainly do not agree with the Board’s holding that “the only form of ‘unprotected’ concerted activity which could privilege the Respondent’s [Petitioner’s] refusal to hire him was such as would justify the refusal to reinstate any ‘employee’ ” [R. 46].⁵² Nor do we agree that the *Phelps-Dodge* case can serve to support the Board’s holding in this case. In fact, that case does not even involve the same question we have here. The question to be answered in this case is whether Cody’s activity was protected by the Act *at the time he did it*, and not whether it would have been protected *if* his status had been different when he did it.

B. Cody’s Activity Was Unprotected Even if He Had Been an Employee.

For the sake of fully arguing our point that Cody was discharged and refused re-employment “for cause,” we shall assume first that he was an “employee” under the Act and, therefore, a beneficiary of its protective features at the time of his so-called “concerted activity.” Even if Cody *had* been an “employee,” even if he *had* engaged

⁵²We discuss on page 71 under this Point the lack of consistency of the Board’s ruling in the *United Elastic* case, cited in Note 28 [R. 46], and its holding in this case.

in “concerted activity,” even if his acts *had* been for “mutual aid or protection” of himself and strikers, it still remains that his refusal to perform the work in the manner he did amounted to “unprotected” activity.

The Board implied that activity is “unprotected” only if it is “tainted with illegality” [R. 45]. Apparently the Board would have us believe that the only “‘unprotected concerted activity’ constituting ‘cause’ for the discharge of any employee” is “activity akin to picket line violence, wilful destruction of . . . property, a sitdown strike,” etc. [R. 46]. At any rate, those are the only kinds of “unprotected concerted activity” alluded to by the Board in its decision. But those are not the only kinds of activity which have been found by the Board and courts to constitute “cause” for discharge (and refusal to reinstate), even though the activity occurred in connection with union affairs.⁵³ We shall discuss a few cases, not all by any means, wherein the Board and the courts have found that certain kinds of activity, not illegal in character and not limited to those enumerated in the Board’s

⁵³*Panaderia Sucesion Alonso, et al., supra*; *International Brotherhood of Teamsters, etc. (International Rice Milling Co.)* (1949), 84 NLRB 360; *Fontaine Converting Works, Inc.* (1948), 77 NLRB 1386, 1387-1388; *The Fafnir Bearing Co.* (1947), 73 NLRB 1008, 1011; *N.L.R.B. v. Montgomery Ward & Co.* (C. A. 8, 1946), 157 F. 2d 486; *C. G. Conn, Ltd. v. N.L.R.B.* (C. A. 7, 1939), 108 F. 2d 390; *Loveman, Joseph & Loeb v. N.L.R.B.* (C. A. 5, 1945), 146 F. 2d 769; *Carnegie-Illinois Steel Corp., supra*; *Greater New York Broadcasting Corp.* (1943), 48 NLRB 718, 720; *The Hoover Co. v. N.L.R.B.*, C. A. 6, No. 11223, July 9, 1951, F. 2d, 28 Labor Relations Reference Manual (BNA) 2353; *Home Beneficial Life Insurance Co. v. N.L.R.B.* (C. A. 4, 1947), 159 F. 2d 280; *U. A. W., et al. v. Wisconsin Employment Relations Board* (1945), 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651; *N.L.R.B. v. Draper Corp.* (C. A. 4, 1944), 145 F. 2d 199; *Wyman-Gordon Co. v. N.L.R.B., supra*.

decision, are adequate “cause” for discharge and “permissible criterion” [R. 49, Note 33] for refusing to hire.

For the three weeks Cody worked during the strike, he was playing a game of “pick and choose.” He wanted to be the sole judge of what work he would do and how it would be done. He did not pick management as his “team”, but he did not choose to go on strike. Cody did not wish to play on either management’s *or* the Union’s team. He testified that he wanted to play on a “team of [his] own” [R. 319]. He was willing to “ride lines” [R. 194], “haul” another person around to do the very work that he (Cody) didn’t want to do [R. 109-110, 189-190]; but, he would not deliver a “run ticket” or a “strapping report” [R. 67, 107, 179-183, 195-196], nor would he gauge and sample Yorba Linda station [R. 110, 195]. Cody’s behavior in this regard was very similar to that of the employees in the *Montgomery Ward* case, *supra*, where the employees refused to handle the orders from a store on strike, but did handle other orders. The court found that such was not “protected concerted activity,” and stated as follows (p. 496):

“While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform”

This quotation accurately described Cody’s activity. He never did say he wanted to go on strike. In fact, when he was asked to go to Yorba Linda Station to take samples for the month-end report, he proposed alternatives such

as that he be permitted to “haul” another; but he did not say that he wanted to join the strikers in order to help further their cause. Instead, he told his superior that he would “have to give the order” [R. 110, 195]. The court went on to say in the *Montgomery Ward* case, “Since these employees were lawfully discharged, they did not remain employees” (p. 496), and that “there was no duty . . . to reinstate them” (p. 497). The court also said that the activity of these employees was not “protected by Section 7 of the Act” (p. 497). The court said that as long as these employees “did not leave the premises nor the employment . . .” there was an obligation on their part “to obey the reasonable instructions of the employer . . .” (p. 497). Therefore, even if Cody *had* been an “employee” at the time of his refusal, his behavior would have amounted to conduct which is “unprotected” by the Act and, therefore, amounted to “for cause.”

The *C. G. Conn* case, *supra*, involved the discharge of some employees who had refused to work overtime and who were ordered reinstated by the Board on the theory that the employees had engaged in “protected concerted activity” under the Act. In that case the court refused to accept the Board’s conclusion that these employees had engaged in protected activity. The court said in effect that an employee cannot be on strike and at work simultaneously, and stated (p. 397):

“We think he [the employee] must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance.”

See also *N. L. R. B. v. Illinois Bell Telephone Co.*, *supra*. The court went on to say in the *Conn* case (p. 397):

“We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer . . .”

Once again we see an amazing similarity existing between the Cody case and one wherein the law has been clarified by a court. The Board's order cannot be sustained, therefore, even under its theory that if Cody had been an “employee” his activity would have been protected.

In the *Loveman, Joseph & Loeb* case, *supra*, the Board found that an employee (Martha Stewart) had been illegally refused re-employment after having concluded that there was a “reasonable likelihood” that she had been discharged “for cause.” (*Loveman, Joseph & Loeb* (1944), 56 N. L. R. B. 752, 762.) The Board rejected the company's claim that it had refused Stewart re-employment because of her earlier discharge due to insubordination, and ordered her re-employed because of its finding that she had been refused “because of her union affiliation” (p. 763). The court reversed the Board, holding that (146 F. 2d at p. 771):

“If the petitioner was justified in discharging Mrs. Stewart for insubordination, it was justified in not re-employing her for the same reason, because there is no evidence whatsoever of any change of heart on the part of the employee or of any repentance for the insubordinate acts that justified her discharge in

the first place, and since the employer was justified in the initial discharge it was justified in keeping her discharged.”

The same situation prevailed in the Cody case. He did later admit that he had been wrong, but he said that he would do the same thing again [R. 148-149, 152, 323, 330, 352]. The Board’s argument that Petitioner cannot *keep* Cody discharged even though it discharged him “for cause” must fall when it is exposed to the light of reason and judicial decisions directly on the point.

There are numerous other cases wherein the Board and courts have found conduct to be not “protected” under the Act even though it was neither illegal nor limited to the kind described by the Board in its decision [R. 46]. for example, the Court of Appeals for the Sixth Circuit ruled recently in the *Hoover Co.* case, *supra*, that a customer boycott espoused by the union and participated in by certain union officer employees did not give the employees immunity from discharge. The court said, “The company was not obliged to employ the members of the local executive board in view of their refusal to terminate the boycott.” The boycott involved in the *Hoover* case was not the kind outlawed by the Act, nor were there any charges of law violations against the union involved in the case. The conduct there was *union activity* of the purest kind, and yet it was found not to be “protected concerted activity.” There is just no basis for the Board’s implication that Cody must be ordered employed because, and only because, his activity had some connection with a strike and, therefore, “necessarily” discouraged Union membership and activity.

In the *Fontaine Converting* case, *supra*, the Board found that certain striking employees' "concerted activity" was not "protected" because ". . . the employees in question walked out, not to advance their own interests, but merely to further the interests of their foreman who they believed was demoted because of the appointment of the new general foreman" (pp. 1387-1388). In that case the Board said, ". . . their concerted activity was not of the character protected by the Act." That activity was not "tainted with illegality."

In the *Wyman-Gordon* case, *supra*, the court reversed the Board's order that employees who had interrupted production with their union activities and had been discharged therefor should be reinstated. The conduct of these employees in the *Wyman-Gordon* case was not "tainted with illegality," nor did it amount to "picket line violence, wilful destruction of the Respondent's property, a sitdown strike" [R. 45-46]. But the conduct was against the interests of the company in the legitimate operation of its business, and the *real* reason for the discharges was the interference with production. This was "for cause." Therefore, the fact that union business and affairs were mixed up in such conduct did not give the employees involved the protection of the Act.

Likewise, the *real* reason for Cody's discharge was his "unprotected" refusal to do the work assigned. It was "for cause" and his conduct cannot be given "protected" status by administrative speculation and dealing in hypotheses.

This Court held in *N. L. R. B. v. Citizen News Company* (C. A. 9, 1943), 134 F. 2d 970, 974:

“The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence.”

The above language of this Court is even more applicable to the instant case because (1) the individual involved here was not an “employee,” (2) there was no “concerted” action, (3) there was no activity for “mutual aid or protection,” and (4) the Board is attempting to force the re-employment of an individual who it admits was legally discharged.

In none of the cases cited above was the activity of the employees “tainted with illegality.” Yet their conduct was not “protected” by the Act. We submit that this Court should remind the Board of the admonition of the Supreme Court more than 14 years ago when it said:

“ . . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.” (*N. L. R. B. v. Jones & Laughlin Steel Co.*, *supra*, at p. 46.)

We have discussed above the reasons why the Board’s order cannot be sustained even under its theory that the activity *would* have been “protected” *if* Cody had been an “employee” at the time of his refusal to do assigned work. Let us now examine our point that Cody was discharged and refused re-employment “for cause,” in the light of the status he *actually* occupied at the time of

his refusal to obey orders. Even under the Wagner Act, which included supervisors as “employees,” the Board recognized that supervisors owed a greater degree of allegiance to their employer than did the rank-and-file employees.⁵⁴

There was a strike involved in the *Greater New York Broadcasting* case, in which a supervisor engineer participated. This engineer led management to believe that he would return to work and “assist in returning the station to the air” (pp. 720-721), but instead he remained on strike. He was discharged and the Board upheld the right of the employer to do so, stating that the engineer had engaged “in deceptive conduct inconsistent with his duty to respondent as chief engineer.” The whole reason for not ordering the employer to re-employ the engineer was that he was discharged “for cause.” He was not, therefore, ordered reinstated even though the activity was “concerted” and *was* for “mutual aid or protection.” Cody’s conduct was wholly “inconsistent with his duty” as an assistant foreman. There is certainly greater basis for holding that Cody’s conduct was not “protected” than there was for holding the engineer’s was not, even if Cody had enjoyed the Act’s protection at the time.

There are numerous cases which make clear that an employer is entitled to operate his business and even meet economic force with economic force.⁵⁵ Therefore, an em-

⁵⁴*Greater New York Broadcasting Corp., supra; Carnegie-Illinois Steel Corp., supra.*

⁵⁵*N.L.R.B. v. Potlatch Forests, Inc., supra; Morand Brothers Beverage Co. v. N.L.R.B., supra; International Shoe Co., supra; Pepsi-Cola Bottling Co. (1947), 72 NLRB 601; Duluth Bottling Association (1943), 48 NLRB 1335.*

ployer is entitled to discharge, and *keep* discharged, a supervisor who does not aid the management in its legitimate operation of its business. [See dissenting opinion, R. 55-56.]

There just can be no argument of logic, reason, or law to the effect that Cody's activity was "protected concerted activity." The above shows clearly also that the activity and conduct of Cody would not have been protected, whether he had been a supervisor or a rank-and-file employee, and even if supervisors had been included in the "employee" definition.

The Board argues in its decision [R. 46, note 28] that its holding here is consistent with its decision in *United Elastic Corporation* (1949), 84 N. L. R. B. 768, because *if* Cody had not been a supervisor at the time of his activity he would have been under the protection of the statute. The Board and the courts have never handled the question of "protected concerted activity" on such theory. The Board has always looked at the facts as they existed at the time; for example, was there a contract in effect, etc. It has never been assumed by the Board and courts that the activity would have been "protected" had the facts been different. If the rationale of the instant case had been followed in the *United Elastic* case, the Board would have held that the employees should have been reinstated because *if* there had been no contract the activity would have been protected. Although one may not wish, nor is it necessary to our position, to liken Cody's conduct to a strike in breach of contract, the fact remains that his disobedience was just as much "cause" for discharge and refusal to rehire as was the strike in

violation of the contract in the *United Elastic* case. Likewise, Petitioner's right to refuse employment to Cody was not later nullified. That is exactly what the Board held in the *United Elastic* case when it said (pp. 776-777):

"This right of discharge, like the suspension of the Respondent's obligation to bargain, already existed when the announcement of the termination of the contract was made, so as not to be dependent on the contract's continued existence. Similarly, this right grew out of the *employees'* wrongful action in striking, and, therefore, continued so long as that action remained wrongful and thus *unprotected* concerted activity. And likewise, this action was, in our opinion, as wrongful after the Respondent's announced termination of the contract as before."

So, that case is far from support for the Board's theory in this case.

C. Section 10(c) of the Act Forbids the Board From Ordering Backpay to or the Re-employment of Cody, Who Was Admittedly Discharged "For Cause."

We come now to the discussion of the amendment to Section 10(c) of the Act wherein Congress clearly prohibited the Board from ordering Cody reinstated.⁵⁶ Section 10(c) is the part of the statute from which the Board derives its authority to frame a remedy for correction of an unfair labor practice. The Supreme Court

⁵⁶The following was added to Section 10(c) of the Act in 1947: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

in the *Phelps-Dodge* case, *supra*, pointed out that the word “reinstatement” is used in that section because “Reinstatement is the conventional correction for discriminatory discharges” (p. 187). The court further noted that it is, in effect, unrealistic to attempt to “. . . differentiate between discrimination in denying employment and in terminating it . . .” (p. 188), and that the right to restore to a man employment denied him is synonymous with the right to put him back in the job from which he was terminated. It is only to be expected that Congress would use the same word “reinstatement” in the amendment as had been contained in the original statute regarding the remedy for discrimination. It cannot be seriously argued, therefore, that the prohibition contained in Section 10(c) applies only to a case where the Board orders a person placed back in the same or substantially equivalent position from which he was discharged. Such an argument would be unrealistic in its approach and would be a subterfuge by which the will of Congress would be defeated.

Why did Congress put this new sentence in the remedy section of the Act? The answer to that question is clear in the legislative history of this amendment. This limitation on the Board had its origin in the House Bill (H. R. 3020, 80th Cong.), and the purpose of it is discussed in the report of the House Committee on that Bill.⁵⁷ On page 42 of the House Report the Committee said that the purpose of this amendment is:

“. . . to put an end to the belief . . . that engaging in union activities carries with it a license

⁵⁷House of Representatives Report No. 245, 80th Congress, on H. R. 3020.

to loaf, wander about the plants, *refuse to work*, waste time, break rules, and engage in incivilities and other disorders and misconduct.” (Emphasis added.)

The Committee further said there that this provision “will require that the new Board’s rulings shall be consistent with what the Supreme Court said . . .” in the *Jones & Laughlin* case, *supra*, and the Committee then quoted a part of that decision including that portion which holds that the Act “does not interfere with the normal right of the employer to select its employees . . .” The Congress was not, by this amendment, merely restricting the Board in orders to put a man back on the job from which he was discharged, but it was also saying that if a man has been discharged or suspended “for cause” the employer can *keep* him discharged. Clearly Congress was aiming at such conduct as listed above, including refusal to work, and it intended to strip the Board of the power to order reinstatement *or* re-employment of “any individual” (not restricted to an “employee”) who had engaged in *any kind* of misconduct and who had been discharged therefor.⁵⁸ The restriction of this sentence is thorough and complete and removed *without qualification* the authority of the Board to order an employer to give work or back pay to “any individual” who has been discharged or suspended “for cause.” The Conference Com-

⁵⁸Whether this restriction would apply in the case of an applicant who had been discharged by a different employer “for cause” is not material to the issue presented here, because Cody had been discharged by Petitioner. That Cody’s previous employment record is a matter to be considered by Petitioner was admitted by the Board’s counsel in the trial [R. 122].

mittee Report (House of Representatives Report No. 510, 80th Congress) states on page 39 that this specific restriction on the Board “. . . applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.” The Conference Committee reiterated the purposes stated by the House Committee (see p. 55 of House Report No. 510). Senator Taft, co-author of the legislation, stated on the floor of the Senate on June 5, 1947 (93 Cong. Rec. 6600), that *specific* types of conduct which would amount to “cause” were not included because of the “fear that the inclusion of such a provision might have a limited effect . . .” In other words, Congress did not wish to limit “cause” to the type of conduct mentioned in the Board’s decision in this case [R. 46]. The Senator said at the same time that there was “a clear intention that these undesirable concerted activities are not to have any protection under the Act . . .” Certainly, before such clear intent on the part of the framers of the legislation can be disregarded there must be something specific in the legislation itself to require it.

Nor can the Board frustrate the intent of Congress by a process of obtuse reasoning by which it comes to the conclusion that the individual was not discharged “for cause” because the conduct would have been protected under a different set of facts. That is what the Board attempts to do here. If Cody’s conduct was not “protected” at the time he engaged in it, and even the Board admits that it was not, then the discharge was “for cause.” Any discharge is either in contravention of the Act or it is not—if it is not a violation of the Act it is “for cause.”

Since Cody's discharge was admittedly not in contravention of the Act, it was "for cause." Therefore, since the discharge was "for cause" and the refusal to rehire was for the same "cause," the Act and the decisions under it prohibit the Board from ordering the same employer who discharged him to put him back to work in *any* job, or to pay him back pay.

Conclusion.

The Board's order in this case should not be sustained since it is without legal support and not supported by substantial evidence on the record as a whole, and in view of the following, enforcement of the order would do violence to the provisions and purposes of the law:

1. Supervisors like Cody have no rights whatsoever under the Act;
2. Cody's activity was not within the meaning of Section 7 of the Act;
3. The refusal to rehire Cody did not and could not reasonably be calculated to discourage membership of employees in the Union;
4. Cody was discharged and refused re-employment for cause.

WHEREFORE, Petitioner respectfully urges that the Board's order be set aside in its entirety.

Respectfully submitted,

J. A. McNAIR,

CHARLES M. BROOKS,

Attorneys for Petitioner.

No. 12916

**In the United States Court of Appeals
for the Ninth Circuit**

THE TEXAS COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD AND ON REQUEST FOR
ENFORCEMENT OF SAID ORDER**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,

General Counsel,

DAVID P. FINDLING,

Associate General Counsel,

A. NORMAN SOMERS,

Assistant General Counsel,

DOMINICK L. MANOLI,

MORRIS A. SOLOMON,

Attorneys,

National Labor Relations Board.

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PAUL P. O'BRIEN
CLERK

INDEX

	Page
Jurisdiction	1
Statement of the case	2
I. The Board's findings of fact	2
A. Background of Cody's employment and union activities	2
B. Discharge of supervisor Cody for refusing to perform work of striking employees	3
C. Discriminatory refusal to hire Cody as a rank-and-file employee after termination of strike	6
II. The Board's conclusions	8
III. The Board's order	9
Summary of argument	10
Argument	11
1. Cody as an applicant for rank-and-file employment was an employee within the meaning and protection of the Act ..	13
2. Cody's refusal to perform the work of the rank-and-file strikers was concerted activity for mutual aid and protection for which, as an employee, he would have been protected under the Act	14
3. The amended Act did not convert concerted activity by supervisors into illegal or wrongful conduct which would justify denial of employment to any employee	17
4. The company's privilege to engage in discrimination against Cody on the basis of his concerted activity as a supervisor terminated when Cody resumed the status of an "employee" within the meaning and protection of the Act	24
5. The Company's other contentions	29
Conclusion	36
Appendix	37

AUTHORITIES CITED

Cases:

<i>Albrecht v. N. L. R. B.</i> , 181 F. 2d 652 (C. A. 7)	18
<i>Amalgamated etc. v. W. E. R. B.</i> , 340 U. S. 383	22
<i>American Shuffleboard Co. v. N. L. R. B.</i> , 28 L. R. R. M. 2489 (C. A. 3)	34
<i>American Steel Foundries v. N. L. R. B.</i> , 158 F. 2d 896 (C. A. 7) ..	18
<i>Auto Workers v. Wisconsin Employment Relations Board</i> , 336 U. S. 245	19
<i>Fort Wayne Corrugated Paper Co. v. N. L. R. B.</i> , 111 F. 2d 869 (C. A. 7)	16
<i>Hazel-Atlas Glass Co. v. N. L. R. B.</i> , 127 F. 2d 109 (C. A. 4)	17
<i>Home Beneficial Life Insurance Co. v. N. L. R. B.</i> , 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758	34

II

Cases—Continued

	Page
<i>John Hancock Mutual Life Insurance Co. v. N. L. R. B.</i> , 28	
L. R. R. M. 2236 (C. A. D. C.)	12, 13, 28, 35
<i>Lily-Tulip Corp.</i> , 88 N. L. R. B. 892	35
<i>N. L. R. B. v. J. G. Boswell Co.</i> , 136 F. 2d 585 (C. A. 9)	16
<i>N. L. R. B. v. Budd Manufacturing Co.</i> , 169 F. 2d 571 (C. A. 6), certiorari denied, 335 U. S. 908	22
<i>N. L. R. B. v. Dixie Shirt Company, Inc.</i> , 176 F. 2d 969 (C. A. 4)	35
<i>N. L. R. B. v. Draper Corp.</i> , 145 F. 2d 199 (C. A. 4)	31
<i>N. L. R. B. v. Fansteel Metallurgical Corp.</i> , 306 U. S. 240	19
<i>N. L. R. B. v. Fulton Bag & Cotton Mills</i> , 175 F. 2d 675 (C. A. 5)	35
<i>N. L. R. B. v. Hudson Motor Co.</i> , 128 F. 2d 528 (C. A. 6)	34
<i>N. L. R. B. v. Illinois Bell Tel. Co.</i> , 189 F. 2d 124 (C. A. 7)	30
<i>N. L. R. B. v. International Rice Milling Co.</i> , 341 U. S. 665	30
<i>N. L. R. B. v. Jones & Laughlin Steel Corp.</i> , 301 U. S. 1	17
<i>N. L. R. B. v. Kelco Corporation</i> , 178 F. 2d 578 (C. A. 4)	17, 19
<i>N. L. R. B. v. Montag Brothers, Inc.</i> , 140 F. 2d 730 (C. A. 5)	16
<i>N. L. R. B. v. Mt. Clemens Pottery Co.</i> , 147 F. 2d 262 (C. A. 6)	19
<i>N. L. R. B. v. Ohio Calcium Co.</i> , 133 F. 2d 721 (C. A. 6)	19
<i>N. L. R. B. v. Peter Cailler Kohler</i> , 130 F. 2d 503 (C. A. 2)	15
<i>N. L. R. B. v. Waumbec Mills, Inc.</i> , 144 F. 2d 226 (C. A. 1)	13
<i>Nevada Consolidated Copper Corp.</i> , 26 N. L. R. B. 1182	28
<i>Order of Railroad Telegraphers v. Railway Express Agency, Inc.</i> , 321 U. S. 342	16
<i>Packard Motor Car Co. v. N. L. R. B.</i> , 330 U. S. 485	18
<i>Panaderia Sucession Alonso</i> , 87 N. L. R. B. 877	33
<i>Phelps Dodge Corp.</i> , 19 N. L. R. B. 547	28
<i>Phelps Dodge Corp. v. N. L. R. B.</i> , 313 U. S. 177	13
<i>Pinaud, Inc.</i> , 51 N. L. R. B. 235	17
<i>Rapid Roller Co. v. N. L. R. B.</i> , 126 F. 2d 452 (C. A. 7), certiorari denied, 317 U. S. 650	16
<i>Republic Aviation Corp. v. N. L. R. B.</i> , 324 U. S. 793	34
<i>Safeway Stores v. Clerks Association</i> , 28 L. R. R. M. 2583	23
<i>Southern Steamship Co. v. N. L. R. B.</i> , 316 U. S. 31	19
<i>Victor Mfg. & Gasket Company v. N. L. R. B.</i> , 174 F. 2d 867 (C. A. 7)	35

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, <i>et seq.</i>)	1, 37
Section 2	37
Section 2 (3)	12
Section 7	9, 38
Section 8	38
Section 8 (a)	38
Section 8 (a) (1)	10, 11
Section 8 (a) (3)	9, 11, 38
Section 8 (a) (4)	29
Section 8 (d)	26
Section 10 (a)	38
Section 10 (b)	39
Section 10 (c)	1, 39

III

Statutes—Continued

National Labor Relations Act—Continued		Page
Section 10 (e)	-----	2, 39
Section 10 (f)	-----	2, 40
Section 14 (a)	-----	22, 23, 41

Miscellaneous:

Browne, W. R., <i>What's What in the Labor Movement</i> , p. 421	-----	15
Fitch, J. A., <i>The Causes of Industrial Unrest</i> , p. 223	-----	15
Gemill, P. F. and Blodgett, R. W., <i>Economics Principles and Problems</i> , Vol. 1, pp. 260-261	-----	15
H. Rept. No. 245, 80th Cong., 1st Sess	-----	20, 21
Labor Management Relations Act, 1947, Sec. 305	-----	22, 26
93 Cong. Rec. 3836	-----	21
93 Cong. Rec. 3423	-----	21
S. Rept. No. 105, 80th Cong., 1st Sess	-----	20, 21

In the United States Court of Appeals for the Ninth Circuit

No. 12916

THE TEXAS COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD AND ON REQUEST FOR
ENFORCEMENT OF SAID ORDER*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the Texas Company, herein called the Company, to review and set aside an order of the National Labor Relations Board (R. 393-399)¹ issued against the Company on April 16, 1951 (R. 31-58), following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), herein referred to as the Act.² The Board in its answer to

¹ References to portions of the printed record are designated "R." Wherever, in a series of references, a semicolon appears, the references preceding the semicolon are to the Board's findings; those which follow the semicolon are to the supporting evidence.

² Relevant provisions of the Act are printed in the Appendix, *infra*, pp. 37-41.

the petition has requested enforcement of its order (R. 400-405). The Board's Decision and Order are reported in 93 NLRB No. 239. This Court has jurisdiction of the proceeding under Section 10 (e) and (f) of the Act, the unfair labor practices here involved having occurred at the Company's operations at and near Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

A. Background of Cody's employment and union activities

From April 6, 1928, until February 1948, George Cody was employed by the Company in the pipeline department of its Los Angeles Basin District in various rank-and-file jobs, from laborer to field gauger (R. 65; 91-92, 96-97, 101-171).

During his employment as a rank-and-file employee, Cody was very active in the Oil Workers International Union, C. I. O., herein referred to as the Oil Workers or the Union, which he joined in 1934 (R. 66; 100). In 1941, he took successive leaves of absence from the Company, for a continuous period of approximately 18 months, to serve as an international representative of the Oil Workers (R. 66; 91, 101, 167-168, 209). Some time after his return to work for the Company, and for an unspecified period ending with his promotion to assistant foreman in February 1948, he served Local 128 of the Oil Workers as Chairman of its Texas Company unit (R. 66; 126-127). Cody participated in that Local's contract negotiations with the Company; was one of the signers for the Oil Workers of the resulting contracts in 1947, including the contract covering

the refinery and pipeline employees; and handled grievances under that contract, first with Superintendent Dreyer and Assistant Superintendent Jones, and then, when necessary, also at higher levels (R. 66; 111-112, 127-128).

In February 1948, Cody was promoted to the supervisory position of assistant foreman (R. 65; 82, 96). As assistant foreman, his job was to make "schedules for the various operations, such as the pump stations, and field gauger, break in people in various jobs in the pipeline division from the line riding job to the field gauging job" and also to check "to see that their work was progressing * * *" (R. 106). Upon his promotion to assistant foreman, Cody secured a withdrawal card from the Oil Workers at the request of Superintendent Dreyer (R. 66; 128-129, 170).

B. Discharge of supervisor Cody for refusing to perform work of striking employees

In September 1948, the Oil Workers called a strike in support of demands for wage increases involving, *inter alia*, the Company's Los Angeles operations (R. 33; 6, 9, 229, 236, 245). Cody was on vacation at that time, from August 23 to September 12, 1948 (R. 66; 97, 172). Four or five days before he was to return to work, Cody telephoned Assistant Superintendent Jones and was told that there was a strike on. Jones advised him, however, to come back to work on Monday, September 13, as the petitioner had obtained a picket-line pass for him from the Oil Workers to do maintenance, safety, and patrol work (R. 66-67; 97-99, 101-102, 129-130, 172-174).

Cody, receiving his picket-line pass,³ patrolled petitioner's pipelines and checked its pump stations beginning on September 12 (R. 67; 106-107, 130-131, 174).⁴ On Thursday, September 13, he was injured in an automobile accident, and was excused from work by Assistant Superintendent Jones from Saturday, September 25, through Tuesday, September 28 (R. 68; 107-108, 177). On Monday, however, Jones telephoned him to report on Tuesday, September 28 (R. 68; 108, 184-185).

When Cody reported to Jones' office on September 28, 1948, Jones advised him that the Company "had changed their minds now," that it was going to start up operations, and that the men were to ride in pairs on lengthened, overtime schedules (R. 68; 108, 185-186). Jones also told Cody to gauge and sample three tanks at the Yorba Linda Pumping Station sometime before October 1, for a "first of the month report" (R. 68; 108, 187). Cody objected to the gauging and sampling, because, as he then told Jones, it was work normally done by the nonsupervisory employees who were out on strike (R. 68-69; 110, 188, 195).⁵ He also reminded Jones

³ Foreman Letson delivered the pass to Cody's home, Cody being reluctant to cross the picket line at the refinery without a pass (R. 98, 362-363).

⁴ Cody testified that he refused to deliver certain strappings on September 21, "because the strappings that are sent out to the various companies * * * are to show on the run tickets as to how much oil was shipped from a tank. I wanted no part in the operation" (R. 67-68; 195-196).

⁵ Gauging and sampling work was ordinarily performed by gaugers and pumpers, nonsupervisory employees who normally worked under Cody's supervision but who were then on strike (R. 110, 133, 223-224, 227-228).

of his long service on behalf of the Union, and said that because of his past close association with the Union he had "an actual fear of what would happen to [his] family and [his] home" if he undertook to perform the work normally done by the strikers (R. 69; 108-109, 111, 187-188, 197).

During this conversation between Jones and Cody, Superintendent Dreyer entered Jones' office. Jones told Dreyer that Cody declined to gauge and sample the tanks and asked what should be done about it (R. 69; 109, 188). Cody repeated what he had told Jones and when Dreyer said he must perform the assignment, asked Dreyer "if he couldn't haul [his] partner and let him do the work."⁶ Dreyer replied that it would not be fair to do that, and that if Cody "couldn't do the work," they would have to discharge him. Cody then told Dreyer "he would have to give the order." Dreyer thereupon instructed Cody to gauge and sample the Yorba Linda tanks and "get the station ready to run." Cody refused and was discharged (R. 69; 109-110, 111, 188-190, 194-195, 197).⁷ Cody immediately secured the cancellation of his withdrawal card from the Oil Workers, reinstated his union membership, and thereafter actively participated in the strike and picketing (R. 42-43, 69-70; 139-143).

⁶ Cody also offered to ride the lines "even 18 hours a day" (R. 194).

⁷ Dreyer stated that Cody "would have to take his chances along with the rest of the strikers" (R. 111).

C. Discriminatory refusal to hire Cody as a rank-and-file employee after termination of strike

On November 4, 1948, when the strike was settled in his department (R. 43; 78-81, 198), Cody asked E. B. O'Connor, manager of the pipeline department and Dreyer's superior, for reinstatement (R. 70; 143-145). O'Connor stated that, in view of the circumstances of his discharge, Cody had to "make his peace" with Superintendent Dreyer before he could be rehired, and made an appointment for Cody to see Dreyer (R. 70; 145-146, 198).

Cody met with Dreyer at the pipeline headquarters on November 8, and asked for the return of his supervisory job, stating that, at O'Connor's suggestion, he had come to see Dreyer to "make amends" (R. 70; 146-148). In the course of the discussion, Dreyer asked whether Cody, if returned to a supervisor's job, would cross certain remaining picket lines to gauge oil or perform other duties that might be assigned him. Cody replied that he could not do that on September 28 and that he still could not do it. (R. 43, 70-71; 148-149, 329-331, 352.) Dreyer stated that he would consider Cody's request for reinstatement and would give him an answer within a week. On November 11, Dreyer telephoned Cody and told him that his decision was still the same as it was on September 28, and that he wished Cody success in finding a job elsewhere. (R. 71; 149, 321-322.)

On Monday, November 15, Cody told O'Connor of his visit to Dreyer and Dreyer's answer (R. 71; 150-151). O'Connor observed that perhaps Cody had been "a little bit too cocky" in requesting his job

back, and asked Cody whether he really wanted to work for the Company, suggesting that perhaps Cody should make his career in organized labor (R. 43, 71; 151). O'Connor stated that he could order Dreyer to put Cody back to work but that he did not think that was the right thing to do and that Cody should "make amends" with Dreyer (R. 71; 151-152, 199). At Cody's request, O'Connor made another appointment for Cody to see Dreyer (R. 71; 152).

On November 16, Cody again saw Superintendent Dreyer, and this time asked for his job or *any job* (R. 43, 71-72; 152-154, 167, 199, 200-202, 227, 323).⁸ He told Dreyer that he thought it was an excessive penalty to discharge him in view of his long service with the Company, and referred to other cases where employees had been merely demoted (R. 72; 165-166, 205-206). Dreyer told Cody that he thought Cody's act "was a premeditated act, that if it had been something * * * done on the impulse of a moment, he might be able to excuse it." (R. 72; 200-201, 329, 330.) At the close of the conversation,

⁸ The Company's assertion that Cody did not seek employment as a "new" employee but sought either reinstatement to his former position of assistant foreman or to a rank-and-file job but with accrued seniority rights (R. 407, Br. 6) is not borne out by the record. Superintendent Dreyer admitted that on both November 16 and February 1 Cody asked for "any work * * * in the pipeline division" including "even in the gang" (R. 323, 324, 327-328). Dreyer informed him that "he could not be reinstated in any position." (R. 326.) Cody, according to Dreyer, also stated that he "wanted to preserve his 21 years' service record" (R. 323, 328) but obviously, in the context of the record, this was no more than an expression of hopeful expectation on Cody's part if he obtained a job, not a condition (R. 167, 200, 201, 204, 207, 227).

Dreyer said that he would consider the matter and give Cody an answer later (R. 72; 153-154). Dreyer telephoned Cody on November 19, told him that his decision was still the same as it was on September 28, and again wished Cody success in finding employment elsewhere (R. 43, 72; 154).

That same day, Cody again appealed to O'Connor, stating that he was getting "double talk" from Dreyer, and suggested that O'Connor arrange to meet both Dreyer and Cody (R. 72; 154-155). O'Connor said he was not satisfied with Dreyer's answers to Cody and would telephone Cody about the matter later (R. 43, 72; 155-156). Not hearing from O'Connor, however, Cody wrote him a letter on December 16, 1948, and then visited him after January 1, 1949 (R. 72; 155, 156, 159-163, 167, 202). O'Connor again told Cody to "make amends" with Dreyer (R. 72; 163). Cody saw Dreyer for the last time on February 1 or 2, 1949, and again asked for a job (R. 43, 72-73; 206-207, 327, 328). Dreyer told Cody in effect that the matter of Cody's application for work and Dreyer's reasons for refusal had been fully discussed and that his ruling was final (R. 43, 72-73; 328-329).⁹

II. The Board's conclusions

Upon the foregoing facts the Board found (R. 42-49) that the Company in denying Cody rank-and-file employment because of his prior refusal to perform the work of the strikers violated Section 8 (a) (1)

⁹ Dreyer admitted that there were new hires in laborer jobs, the lowest classification, under his jurisdiction after November 16, 1948 (R. 344, 348-350).

and 8 (a) (3) of the Act. The Board found that Cody as an applicant for such employment stood in the position of an "employee" within the meaning and protection of the Act; that his refusal to perform the work of the rank-and-file strikers constituted concerted activity for mutual aid and protection for which, as an employee, he enjoyed the protection which the Act extends to such activities; that although Congress denied supervisory employees the affirmative protection of the Act for such activities, it did not convert such activities by supervisors into unlawful or wrongful conduct so as to deprive an ex-supervisory employee of the normal protection of the Act for such activities when he applies for rank-and-file employment.

III. The Board's order

The Board's order (R. 51-54) requires the Company to cease and desist from discriminating with regard to the hire and tenure of employment of Cody. It also requires the Company to cease and desist from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Oil Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities as guaranteed in Section 7 of the Act, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement as authorized in Section 8 (a) (3). Affirmatively, the order requires the Com-

pany to offer Cody employment as an employee in its pipeline division of the refining department, Pacific Coast Division, Los Angeles, California, to make him whole for any loss of pay he may have suffered by reason of its discrimination against him, from the date, after November 16, 1948, when the Company first employed any individual in any job for which Cody was qualified, and to post appropriate notices.

SUMMARY OF ARGUMENT

The Board properly found that the Company violated Section 8 (a) (3) and 8 (a) (1) of the Act by refusing to employ Cody for rank-and-file work because of his prior refusal, as a supervisor, to perform the work of the rank-and-file strikers. As an applicant for rank-and-file employment Cody was an employee within the meaning and protection of the Act. His refusal to perform the work of the strikers was concerted activity for mutual aid or protection for which he, as an employee, would have been protected under the Act.

In excluding supervisors from the protection of the Act Congress did not convert concerted or union activity by supervisors into illegal or wrongful conduct which would justify denial of employment to any employee. Congress simply sought to remove any compulsion upon employers to refrain from discharging or otherwise discriminating against supervisors for engaging in union or concerted activities in order to assure to management the undivided loyalty of its supervisory personnel.

Congress, however, did not intend to confer a privilege upon employers to discriminate against employees within the meaning of the Act on the basis of their prior concerted activity as supervisors. Such an interpretation of the Act is not only inconsistent with the legislative purpose in privileging employers to discriminate against supervisors but would also license employers to permanently blacklist from employment rank-and-file employees who, as supervisors, had previously engaged in such activities. Congress manifestly intended no such result.

Accordingly, although Cody as a supervisor was not protected for refusing to "scab," as an applicant for rank and file employment he regained the protection of the Act for his prior participation in concerted activities. And the Company's refusal to employ Cody for rank-and-file work, based as it was upon Cody's earlier concerted activity, constitutes restraint and discrimination within the meaning of Section 8 (a) (1) and 8 (a) (3) of the Act.

ARGUMENT

The Board properly found that the Company violated Section 8 (a) (3) and (1) of the Act by refusing to employ Cody in a nonsupervisory capacity because of his prior participation in concerted activities in support of the rank-and-file strikers

The Company asserts throughout its brief that Congress removed supervisory employees from the protection of the Act and that it was not unlawful for it to discharge Cody from his supervisory post for his refusal to perform the work of the strikers.

From this premise the Company concludes and asserts that it was not unlawful for it to deny Cody rank-and-file employment for that reason even though Cody, as an applicant for such work, was no longer a member of the supervisory class of employees.

The Company cites many cases in support of its premise, here undisputed, that Congress in the amended Act removed any compulsion upon employers to refrain from discharging or otherwise discriminating against supervisory employees, as supervisors, who engage in concerted or union activities. But the premise does not support the conclusion the Company draws and begs the question at issue. The Company's position reduces itself to the argument that the privilege given an employer to discriminate against supervisory employees for their union or concerted activities also permits their permanent blacklisting for employment as rank-and-file employees. But, as the Court of Appeals for the District of Columbia Circuit pointed out in the closely analogous case of *John Hancock Life Ins. Co. v. N. L. R. B.*, 28 L. R. R. M. 2236, decided July 5, 1951, it is inconceivable that Congress meant to "license the vicious practice of blacklisting" with respect to ex-supervisory employees. Such an interpretation of the Act, as that court pointed out, would constitute "a perversion of the legislative intent."

Accordingly, it is the Board's view that the privilege which Congress conferred upon employees to discriminate against supervisory employees for union or concerted activities cannot reasonably be said to

include the further privilege to permanently disqualify ex-supervisory employees from rank-and-file employment.

We believe for the reasons stated hereinafter that the Board's appraisal of the congressional intent is reasonable and correct.

1. Cody as an applicant for rank-and-file employment was an employee within the meaning and protection of the Act

Section 2 (3) of the Act provides that the term "employee" "shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise * * * but shall not include * * * any individual employed as a supervisor." This comprehensive statutory definition of the term "employee," as the Supreme Court has pointed out, includes, in the absence of "some specific delimiting provision," not only the employees of a particular employer but also in a generic sense, members of the working class, including applicants for employment. "To circumscribe the general class, 'employees' we must find authority either in the policy of the Act or in some specific delimiting provision of it." *Phelps Dodge Corporation v. N. L. R. B.*, 313 U. S. 177, 191-192. Accord: *John Hancock Life Ins. Co. v. N. L. R. B.*, *supra*; *N. L. R. B. v. Waumbec Mills Inc.*, 114 F. 2d 226, 232-234 (C. A. 1).¹⁰

¹⁰ In its brief (pp. 28-33) the Company asserts that the *Phelps Dodge* decision is inapplicable here because in the amended Act Congress has specifically excluded supervisory employees from the definition of the term "employees" in the Act and thereby sup-

In the light of this settled interpretation it is not open to question that Cody, when he applied for rank-and-file employment on November 16, 1948, was an employee within the meaning of the Act. His supervisory status had been previously terminated when he was discharged by the Company. As an applicant for rank-and-file employment he was no longer a supervisor but a member of "the general class" included, as the Supreme Court pointed out (*Phelps Dodge* case), within the statutory definition of the term "employee" and therefore entitled to the protection of the Act for union or concerted activity for mutual aid or protection.¹¹

2. Cody's refusal to perform the work of the rank and file strikers was concerted activity for mutual aid and protection for which, as an employee, he would have been protected under the Act

Section 7 of the amended Act, as in the original, guarantees to employees the right, among others, "to assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection" free from employer restraint or discrimination. One of the traditional forms of assistance to a labor organization and concerted activity for mutual aid and protection has

plied a "specific delimiting provision." The Company's argument appears to be that once a supervisor, always a supervisor. Obviously, to state the proposition is to refute it. Nothing in the Act suggests that an individual who loses his supervisory status does not as an applicant for rank-and-file employment revert to the status of an employee within the statutory definition.

¹¹ The Company's assertion (Br. 6) that Cody did not seek employment as a "new" employee is not borne out by the record. See *supra*, n. 8, p. 7.

been the well recognized practice of workers, particularly union members, to refuse to "scab" or serve as strikebreakers and perform the work of striking employees. "In common current usage * * * the term 'scab' is most often applied to any person who hires or volunteers to take the place of a worker out on strike. * * * In the eyes of trade unionists 'scabbing' is the sin of sins."¹² In refusing to perform the work normally done by strikers, employees, like Cody here, are, to that extent and in the most literal and fundamental sense, rendering assistance to the striking union and making common cause with its members in their concerted activity. As Judge Learned Hand said in *N. L. R. B. v. Peter Cailler Kohler*, 130 F. 2d 503 (C. A. 2) at pp. 505-506:

* * * When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

¹² W. R. Browne, *What's What In The Labor Movement*, p 421. The opprobrium with which workers universally regard "scabbing" is a by-word in labor circles. See, P. F. Gemill and R. W. Blodgett, *Economics Principles and Problems*, Vol. I, pp. 260-261; J. A. Fitch, *The Causes of Industrial Unrest*, p. 223.

So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in "mutual aid or protection."¹³

The Act has "generally been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346. In enacting a statute having such scope, Congress cannot reasonably be deemed to have excluded from the right of employees to assist labor organizations and engage in concerted activities so traditional a practice as their refusal to "scab." *Rapid Roller Co. v. N. L. R. B.*, 126 F. 2d 452, 461 (C. A. 7), certiorari denied, 317 U. S. 650.

This is not to say that the Act makes it unlawful for an employer to discharge an employee for any activity sanctioned by or in support of a union. Where such activity is *per se* illegal or in support of unlawful concerted activity or so completely without

¹³ Accord: *N. L. R. B. v. Montag Bros.*, 140 F. 2d 730 (C. A. 5), enforcing 51 NLRB 366; *N. L. R. B. v. J. G. Boswell*, 136 F. 2d 585 (C. A. 9); *Fort Wayne Corrugated Paper Co. v. N. L. R. B.*, 111 F. 2d 869, 874 (C. A. 7); *Rapid Roller Co. v. N. L. R. B.*, 126 F. 2d 452 (C. A. 7), certiorari denied, 317 U. S. 650.

justification as to be indefensible, the employer is free to take disciplinary action against those who participate in such misconduct.¹⁴ Nor is an employer required to permit an employee to remain on the job and at the same time refuse to do the employer's lawful bidding. In those circumstances an employer is privileged, as an incident of his right to replace economic strikers, to give the employee an election to either work as instructed or to leave and join the strikers. But the employer may not compel the employee, upon pain of dismissal or other reprisals, to forego his traditional and protected right to refuse to "scab." *Pinaud, Inc.*, 51 NLRB 235; See also *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45-46. In this fashion a practical balance is struck between the right of the employer to operate his business and the right of the employee to engage in concerted activity for mutual aid and protection.

Accordingly, Cody's refusal to "scab" was a form of concerted activity for which, as an employee, he would be protected by the Act.

3. The amended Act did not convert concerted activity by supervisors into illegal or wrongful conduct which would justify denial of employment to any employee

Under the original Act, it was settled that supervisory employees, like rank and file employees, were employees within the meaning of the Act and there-

¹⁴ *Hazel-Atlas Glass Co. v. N. L. R. B.*, 127 F. 2d 109, 117 (C. A. 4; on rehearing); *N. L. R. B. v. Kelco Corp.*, 178 F. 2d 578 (C. A. 4).

fore entitled to the same protection for assisting labor organizations or otherwise engaging in concerted activities for mutual aid and protection which the Act extended to nonsupervisory employees. *Packard Motor Car Co. v. N. L. R. B.*, 330 U. S. 485. And, by that token supervisors who refused to “scab” ordinarily enjoyed ¹⁵ the same protection against restraint or discrimination for engaging in such sympathetic action as did the rank and file employees. Cf. *American Steel Foundries v. N. L. R. B.*, 158 F. 2d 896 (C. A. 7).

In Section 2 (3) of the amended Act Congress redefined the term “employee” so as to withdraw from supervisors the protection from employer discrimination which the statute had theretofore guaranteed to them, as to other employees, for assisting labor organizations or engaging in concerted activity for mutual aid or protection. But in denying to supervisors the protection which they had previously enjoyed, Congress clearly did not intend, as the Board pointed out and as is evident from the legislative history of the amendment, its purpose and the express provisions of the Act itself, to convert such concerted activity on the part of supervisors into indefensible,

¹⁵ The Board declined to extend the protection of the original Act to supervisors who refused to perform maintenance work, during a strike of nonsupervisory personnel where it appeared that it was customary for supervisors to do such maintenance work during periods of emergency when rank and file employees were not available and also that unless certain plant facilities were maintained during the strike, serious injury to life and property might have resulted from explosions and other causes. *Albrecht v. N. L. R. B.*, 181 F. 2d 652 (C. A. 7).

or wrongful or illegal conduct, akin to picket line violence,¹⁶ willful destruction of an employer's property¹⁷ mutiny¹⁸ or a sitdown strike,¹⁹ or recurrent "quickie" strikes²⁰ which would normally justify an employer's discharge of, or refusal to hire any employee regardless of rank. On the contrary, Congress explicitly recognized the "right" of supervisory employees to engage in otherwise lawful concerted activities; it did not make participation in such activities by supervisors unlawful or wrongful but only withdrew from that class the affirmative statutory protection which it had previously accorded to them and other employees for engaging in concerted activities.

In the *Packard Motor* case, *supra*, decided in March 1947, the Supreme Court held that supervisors were employees within the meaning of the original Act. Later that year Congress, in considering amendments to the original Act, took note of the fears expressed by the employer in the *Packard* case and others that if supervisors were to be deemed employees within the meaning of the statute, and entitled to its protection for engaging in concerted activities, that situation would give rise to conflicting loyalties between a supervisor's organizational interest and his allegiance to

¹⁶ *N. L. R. B. v. Kelco Corporation*, 178 F. 2d 578 (C. A. 4); *N. L. R. B. v. Ohio Calcium Co.*, 133 F. 2d 721 (C. A. 6).

¹⁷ *N. L. R. B. v. Mt. Clemens Pottery Co.*, 147 F. 2d 262, 267-268 (C. A. 6).

¹⁸ *Southern Steamship Company v. N. L. R. B.*, 316 U. S. 31.

¹⁹ *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240.

²⁰ *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U. S. 245.

his employer's interests. It was urged upon Congress that unless it took steps to exclude them from the coverage of the statute, "management will be deprived of the undivided loyalty of its foremen" because there "is an inherent tendency to subordinate their interests whenever they conflict with those of the rank and file." S. Rept. No. 105, 80th Cong., 1st Sess., p. 5. See also H. Rept. No. 245, 80th Cong., 1st Sess., p. 13-17. These views prevailed and in response thereto Congress excluded supervisors from the definition of the term "employee" as used in the Act, thereby withdrawing from them the affirmative protection of the Act for concerted activities and leaving employers free to remove supervisors who engaged in union or concerted activities from any role in the management hierarchy. But at the same time, Congress did not redefine the "right" of supervisory employees to engage in otherwise lawful concerted activities so as to make participation in such activities by supervisors unlawful or wrongful or the basis for permanent disqualification from non-supervisory employment.

Thus, both the Senate and House committees, reporting upon the bill which later became the amended Act, agreed that the limitation upon the term "employee" was not designed to make it unlawful for supervisors to engage in union or concerted activities but was designed, as Congress saw it, to assure management "of the undivided loyalty of its foremen," and to remove any compulsion upon employers to retain as a member of the management hierarchy any

supervisor who engaged in concerted activities. As both committees reported, the bill did "not prevent anyone from organizing. * * * It merely relieves employers who are subject to the national act from any compulsion [under the Act] to accord to the front line of management the anomalous status of employees." S. Rept. No. 105, 80th Cong., 1st Sess., p. 5. See H. Rept. No. 245, 80th Cong., 1st Sess., pp. 13-17. Senator Taft, coauthor of the amended Act, explaining the effect of the amended definition of employees, stated "They [supervisors] are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act." 93 Cong. Rec. 3836. See also to the same effect the statement of Representative Hartley in 93 Cong. Rec. 3423.

Nothing in the legislative history of the Act suggests that Congress, in withdrawing from supervisors the affirmative protection of the Act for engaging in concerted activities, intended to place the stamp of illegality or misconduct upon such activities so as to disqualify the participant, as an "employee" within the meaning of the Act, from future rank and file employment. Any doubt on this score is conclusively resolved by Section 14 (a) of the Act which provides, in pertinent part, "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law,

whether national or local, relating to collective bargaining.” In other sections of the Act, Congress “demonstrated that it knew how” (*Amalgamated etc. Employees v. WERB*, 340 U. S. 383, 397), had it been so minded, to make participation in concerted activities by supervisors illegal and to prescribe penalties for such conduct. Thus, in Section 305 of the *Labor Management Relations Act, 1947*, it expressly provided that “It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporation to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.”

Consistent with the legislative history of the Act and its specific provisions, the courts have recognized that the exclusion of supervisors from the protection of the Act did not convert concerted activities undertaken by them which had been previously protected into unlawful or improper conduct permanently disqualifying the participant from rank and file employment. As the Court of Appeals for the Sixth Circuit pointed out in *N. L. R. B. v. Budd Mfg. Co.*, 169 F. 2d 571, certiorari denied, 335 U. S. 908, at p. 577, “There is nothing in the amended Act which restricts freedom of speech on the part of supervisory employees. Section 14 (a) of the amended Act specifically reserves to them the right to join a labor

organization. The rights guaranteed by the First Amendment [i. e. the right to form and assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for mutual aid or protection] are not interfered with. The amended Act merely changes the statutory method of enforcing those rights." And as the California District Court of Appeals stated in *Safeway Stores v. Clerks Association*, 28 LRRM 2583, at p. 2584:

It is clear that by the adoption of Section 14 (a) the Congress intended to exclude supervisory employees from all the benefits of the Wagner Act as modified by the Taft-Hartley Act and from the like benefits of any state ("local") act which placed any compulsion or restraint upon employers in collective bargaining with their employees. It is equally clear that the Congress by this enactment did not place any restriction on the common law or nonstatutory rights of supervisory employees to organize for the purpose of bargaining with their employers and to use any of the recognizedly legal methods of pressure (striking, picketing, etc.) which the common or nonstatutory law accorded to them as employees. Indeed the Congress went a step further and made explicit, what otherwise would only have been implicit, by expressly enacting in section 14 (a): "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization."

In sum, both the legislative history and the language of the Act itself establish that Congress in excluding supervisors from the coverage of the Act intended to do no more than withdraw from them the affirmative protection for concerted activities previously guaranteed to them, and absolve from liability under the statute employers who discharged or otherwise discriminated against supervisors for engaging in such activities. Congress did not intend to stigmatize concerted activity by supervisors as wrongful or equate it with unlawful action.

Accordingly, under the amended Act Cody's refusal to "scab" and perform the work of the rank-and-file employees who were engaged in an economic strike was neither unlawful nor akin to conduct which would constitute cause for the disqualification of any employee from employment. The amended Act only withdrew from him, as a supervisor, the affirmative protection against discrimination for that conduct which the original Act had given him. And the Company was privileged, as it did, to terminate his employment as a supervisor on that account. But, as is shown below, the Company's privilege to discriminate against him ceased with Cody's return to the status of employee.

4. The Company's privilege to engage in discrimination against Cody on the basis of his concerted activity as a supervisor terminated when Cody resumed the status of an "employee" within the meaning and protection of the Act

As already stated, the basic purpose prompting Congress to exclude supervisors as a class from the affirmative protection of the Act was to insure to

management the "undivided loyalty" of its supervisory personnel. And to protect that interest, Congress, as the Board has of course recognized, privileged the employer to take disciplinary action that would otherwise be discriminatory and unlawful if the individual were an employee against supervisors who engage in concerted or union activities.

But in the light of the legislative purpose and the serious consequences that would flow from a contrary interpretation, it would seem clear that Congress could not have intended to strip an ex-supervisor permanently of the protection of the Act for prior concerted activity and to permit an employer to permanently blacklist an ex-supervisory employee. The interest of the employer in the undivided allegiance of supervisory employees which Congress sought to protect is fully vindicated and served once the employer has removed a supervisor who engages in concerted activity from the management hierarchy. And the protection of that interest plainly does not require that ex-supervisory employees, who have resumed that status of employees within the meaning of the Act, be permanently subject to reprisals, as a rank-and-file employee, for prior concerted activity. Once the individual resumes the status of employee the employer's interest in the "undivided loyalty" of his "front line," in the sense intended by Congress, no longer exists with respect to that individual and no legitimate purpose is served in thereafter denying to him protection for his previous concerted activity

and permitting the employer to disqualify him from rank and file employment for that reason.

Moreover, the interpretation urged by the Company would license not only it but other employers forever to blacklist or subject to economic reprisals a rank-and-file employee, like Cody, who had, during his status as a supervisory employee, engaged in concerted activities. Indeed, the Company not only recognizes this implication of its contention but insists that this is precisely what Congress intended to accomplish.

That Congress sought to inflict no such penalties upon ex-supervisory employees is, we think, made manifest by its contrasting treatment of government employees who engaged in strikes and of employees who engaged in strikes in violation of Section 8 (d) of the Act. With respect to government employees who participated in a strike, Congress, in Section 305 of the *Labor Management Relations Act, 1947* (*supra*, p. 22) specifically provided for the forfeiture of their civil service status and in effect partially blacklisted them from future government employment for three years. In Section 8 (d) of the Act Congress specifically provided that any employee who engaged in a strike called without compliance with the "waiting period" therein prescribed "shall lose his status as an employee of the employer engaged in the particular labor dispute * * * and * * * such loss of status shall terminate if and when he is re-employed by such employer." There, Congress specifically conferred a privilege upon the employer to permanently blacklist the offending employee.

Congress enacted no such similar provisions with respect to supervisory employees. It excluded them as supervisors from the protection of the Act. But, significantly it omitted any provision that as "employees" they should also be subject to continuing reprisals or blacklisting on the basis of their previously unprotected concerted activities as supervisors. In the absence of evidence of a Congressional purpose to license the blacklisting of ex-supervisory employees, with respect to rank-and-file employment, for prior participation in concerted or union activities, and in view of the reasons which prompted Congress to exclude supervisors from the protection of the Act, we submit it was reasonable for the Board to conclude, as it did, that once a supervisory employee resumes the status of an employee, he regains the protection of the Act for his previous concerted activity.

An analogy will serve to demonstrate the soundness of the Board's conclusion. Suppose, for example, that an employee prior to the passage of the original Act had engaged in concerted or union activities. An employer would have then been free to discharge or otherwise discriminate against that employee since the latter's activities had no affirmative statutory protection. Clearly, however, it cannot reasonably be argued that after the passage of the Act the employer could have blacklisted the employee or visited economic reprisals upon him on the basis of his previously unprotected activity. At that juncture, the employee gained what he had previously lacked, the protection of the Act, and to have then permitted the

employer to penalize him for his previous union, albeit then unprotected, activities would have been tantamount to sanctioning his permanent blacklisting. Such a result would have seriously thwarted the Congressional purpose in protecting employees who engaged in concerted activities and it is unthinkable that Congress denied the employee in that situation the protection of the Act. Cf. *Nevada Consolidated Copper Corp.*, 26 N. L. R. B. 1182, 1192, 1198-1200, enforced 316 U. S. 105; *Phelps Dodge Corp.*, 19 NLRB 547, 565, enforced 313 U. S. 177.

We submit it is equally unreasonable to suppose that Congress meant to license an employer to discriminate against an ex-supervisor, like Cody, on the basis of his concerted activities as a supervisor once that individual has resumed the status of an employee and thereby regained the protection of the Act. The decision of the Court of Appeals for the District of Columbia Circuit in *John Hancock Life Ins. Co. v. N. L. R. B.*, *supra*, is precisely in point. There the employer discharged a supervisory employee for having testified in Board proceedings and thereafter refused him rank and file employment for the same reason. The Board found that as an applicant for rank and file employment the ex-supervisor was an employee within the meaning of the Act and that the employer's refusal to hire him violated Section 8 (a) (4) of the Act which enjoins employers from discriminating against employees for having testified in Board proceedings. The employer, like the Company here, asserted that the ex-supervisor was not entitled to the protection of the Act because he was a super-

visor when he testified. The Circuit Court agreed with the Board that as an applicant for rank and file work, the individual in question was an employee within the meaning of the Act and that as an employee he regained the protection of the Act for having testified in the Board proceeding. The Court rejected the Company's contention, saying that such an interpretation of the Act would not only "license the vicious practice of blacklisting" but also constitute "a perversion of the legislative intent."

In sum, as an applicant for rank-and-file employment Cody became an employee within the meaning of the Act. As an employee he regained what had previously been denied to him, the protection of the Act for his prior concerted activities. To conclude otherwise would be not only to ignore the precise nature of the limitations imposed by Congress on union or concerted activities by supervisors but also to sanction his permanent blacklisting from employment—a result that Congress did not intend.

5. The Company's other contentions

Apart from its basic contention that the privilege which the Act granted it to discharge Cody from his supervisory post for his refusal to perform the work of the strikers also includes the right to exclude him permanently for that reason from rank and file employment, the Company makes the following additional contentions.

a. The Company asserts (Br. 39–48) that Cody's refusal to perform the work of the strikers was not in any event concerted activity for mutual aid or

protection within the meaning of the Act because Cody acted individually and sought no immediate benefit for himself from the Company. But neither the lack of agreement between Cody and the strikers to act in "concert" with each other nor the fact that Cody had no immediate stake in the outcome of the strike removes his action from the scope of concerted activity for mutual aid or protection. It is enough that Cody by his action in fact lent assistance to the striking union. And it is enough that his stake in the outcome is simply that by his action he in effect assured himself "in case his turn ever comes, of the support of the [strikers] whom [he was] helping; and the solidarity so established is 'mutual aid' in the most literal sense as nobody doubts." Judge L. Hand in *Peter Cailler Kohler*, *supra*.

In this connection, the Company relies upon *N. L. R. B. v. Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7) and *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665. The *Rice Milling* case is clearly inapplicable here. There the court held that a union which picketed the premises of an employer with whom it had a dispute and thereby induced an individual employee of that employer's customer not to cross the picket line for the purpose of making deliveries to the picketed employer had not induced employees of the customer to engage in a concerted refusal to perform service in furtherance of a secondary boycott within the meaning of Section 8 (b) (4) (A) of the Act. That section provides that it shall be unlawful for a union to induce the employees of an employer to engage in a concerted refusal to

perform service where an object thereof is to force one employer to cease doing business with another. The court concluded that Section 8 (b) (4) (A) could apply, if at all, only if there was inducement to “concerted action of the customers’ employees to force the customer to boycott the mill” (*N. L. R. B. v. Denver Building Trades Council*, 341 U. S. 675, 687–688.) [Italics added.] No such inducement was found to exist there. Nothing in the case suggests that the employee who refused to cross the picket line was not acting in concert, or making common cause, with the picketing union within the meaning of Section 7 of the Act or that if that employee had been discharged for that reason he would not have enjoyed the full protection of the Act for concerted activities.

In the *Illinois Bell* case, the Seventh Circuit Court held that the Wagner Act, even though it protected supervisors in the same manner as rank-and-file employees, did not extend its protection to those employees in a situation where they, at a time when their own union had a contract with their employer and was in the process of negotiating a new contract, refused to work behind picket lines maintained by another union. The Board disagrees with that decision and has petitioned for a writ of certiorari. In any event, it is not controlling here because that case has the feature, not present here, that the supervisors’ refusal to work behind the picket line, in the circumstances there present, took on the aspects of a “wildcat strike” which has been held not to enjoy the protection of the Act. See *N. L. R. B. v. Draper Corp.*, 145 F. 2d 199 (C. A. 4).

b. The Company also argues that (Br. 48-58) the denial of rank and file employment to Cody cannot constitute a violation of Section 8 (a) (1) or 8 (a) (3) since it cannot be said that its action discourages or tends to discourage union or concerted activity by Cody, as an employee, or other rank and file employees. Its action, the argument runs, at most can only signify to Cody and other employees that the Company will, as it may lawfully do, penalize supervisors, not rank and file employees, who engage in such activities. But this contention overlooks the inescapable impact which the Company's virtual blacklisting of Cody from rank and file employment will have not only on Cody but also on his fellow rank and file workers. If the Company is correct in its interpretation of the Act, Cody faces, as we have shown above, the prospect of permanent unemployment. Such a penalty is not likely to predispose him to look forward to future participation in union or concerted activity even as a rank and file employee. On the contrary, the greater likelihood is that it will predispose him to give assurances to a prospective employer, in order to escape permanent blacklisting from employment and obtain work, to abstain from all such activities in the future. And in his plight his fellow employees, without regard to such niceties as that the Company's object lesson is intended to be confined to supervisors and ex-supervisory employees read a compelling object lesson as to the advisability of their own future participation in such activities. Thus, the Company's reprisal against Cody in deny-

ing him rank and file employment tends in a very real sense to restrain and discourage both Cody and his fellow employees from future participation in union or concerted activities.²¹

The circumstance that the Company's action may not have been prompted by a conscious anti-union purpose does not remove it from the proscription of the Act. If, as here, the employer's discriminatory action is based on protected union or concerted activity, it is immaterial that he may not have been motivated by a purpose to injure the union. For as the Board and the courts have pointed out economic reprisals against employees based in fact upon their

²¹ In support of its contention in this respect, the Company, as did a minority of the Board, relies upon the Board's decision in *Panaderia Sucesion Alonso*, 87 NLRB 877. There, the Board found that the employer did not violate the Act in discharging one Gutierrez who had protested the employer's dismissal of an agricultural employee. The Board concluded that since agricultural employees are not covered by the Act, Gutierrez had not engaged in concerted activities protected by the Act and that the circumstance that his dismissal may have had the incidental effect of discouraging employees within the meaning of the Act from exercising their statutory rights did not cause the employer's essentially privileged conduct to assume the character of an unfair labor practice. As the Board pointed out in the instant case, in the *Panaderia* case, the discharge was one which was clearly aimed at the activities of agricultural employees and of the single nonagricultural employee who joined with them. But here, the Company's refusal to employ Cody for a rank and file job, *as distinguished from its discharge of Cody from his supervisory post*, was directed against Cody as an employee for activities for which in that capacity he had regained the protection of the Act. In these circumstances the discouraging effect which the Company's denial of employment had upon the union activities of Cody and other employees within the protection of the Act, cannot be regarded as incidental to "essentially privileged conduct."

union or concerted activities necessarily tend, without regard to the "state of the employer's mind" (*American Shuffleboard Co. v. N. L. R. B.*, 28 LRRM 2489 (C. A. 3), to discourage such activities. Cf. *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793. *Home Beneficial Life Ins. Co. v. N. L. R. B.*, 159 F. 2d 280, 285 (C. A. 4), certiorari denied, 332 U. S. 758; *N. L. R. B. v. Hudson Motor Co.*, 128 F. 2d 528, 533 (C. A. 6).

c. The Company also asserts (Br. 59-76) that the Board's decision and its order requiring it to offer Cody rank and file employment are in conflict with Section 10 (c) of the Act which provides that "no order of the Board shall require the reinstatement of any individual who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." Since, the Company asserts, Cody was discharged from his supervisory post "for cause" i. e. a reason that was not illegal, Section 10 (c) precludes the interpretation placed upon the Act by the Board here and also its order requiring the Company to offer Cody rank and file employment and make him whole for loss of pay caused by the discrimination against him. But the prohibition in Section 10 (c) against reinstating employees who have been discharged for cause is applicable only where the discharge is an issue in the case. It has no application to a situation like the instant one where the employee may have been

previously discharged for cause but that discharge is not the issue in the case. The issue here is whether the Company denied Cody's application for rank-and-file employment for cause. As we have sought to show, Cody was denied employment for concerted activities for which, as an employee, he was protected under the Act. Having found that employment was denied him for unlawful discriminatory reasons, the Board could, as it did, require the Company to undo that wrong. *John Hancock Life Ins. Co. v. N. L. R. B.*, *supra*; *N. L. R. B. v. Dixie Shirt Co.*, 176 F. 2d 969, 974 (C. A. 4) and cases cited there; *N. L. R. B. v. Fulton Bag and Cotton Mills*, 175 F. 2d 675, 677 (C. A. 5); *Victor Mfg. & Gasket Co. v. N. L. R. B.*, 174 F. 2d 867, 868 (C. A. 7).²²

²² The Board has held that where an employer has in effect a nondiscriminatory rule against "down grading" he may lawfully refuse rank and file employment to a former supervisor previously discharged for continuing union membership. *Lily-Tulip Corp.*, 88 NLRB 892, 893. Here, as the Board found (R. 49), there is no evidence that the Company had adopted such a rule so as to bring into operation the Board's ruling in the *Lily-Tulip* case. On the contrary, in the Company's 1947 and 1948 contracts with the Oil Workers, there is a provision for the "down grading" of supervisory employees who were found to be incapable of performing the work to which they had been promoted (R. 124, 125). And Cody was not denied rank and file employment on the basis of any such rule.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition to set aside the Board's order be denied, and that a decree should issue enforcing the order in full.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

DOMINICK L. MANOLI,
MORRIS A. SOLOMON,
Attorneys,
National Labor Relations Board.

OCTOBER 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.*) are as follows:

Sec. 2. When used in this Act—

* * * * *

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employee as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railroad Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in

connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) it shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means

of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof

to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the

Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

LIMITATIONS

* * * * *

Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

* * * * *

No. 12927

United States
Court of Appeals
for the Ninth Circuit.

RKO RADIO PICTURES, INC., a Corporation,
Appellant,
vs.

ANN SHERIDAN,
Appellee.
and

ANN SHERIDAN,
Appellant,
vs.

RKO RADIO PICTURES, INC., a Corporation,
Appellee.

Transcript of Record

In Two Volumes

Volume I
(Pages 1 to 304)

Appeals from the United States District Court,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Rotunno, Vito.....	68
Amended Complaint	3
Answer and Counterclaim	17
Answer to Counterclaim	31
Appeal:	
Notice of (Defendant's)	77
Notice of (Plaintiff's)	78
Order Extending Time for Filing the Record on and Docketing	82
Statement of Points Upon Which Appellant RKO Radio Pictures, Inc., Intends to Rely on	618
Statement of Points Upon Which Appellant Ann Sheridan Intends to Rely on ..	621
Stipulation Designating Record on	79
Certificate of Clerk	616
Judgment	75
Jury Instructions Requested by Defendant....	57
Memorandum for Counsel	33
Memorandum to Counsel Re Pre-Trial Order..	38

INDEX	PAGE
Names and Addresses of Attorneys	1
Notice of Appeal Filed by Defendant	77
Notice of Appeal Filed by Plaintiff	78
Order Extending Time for Filing the Record on Appeal and Docketing the Appeal	82
Plaintiff's Requested Instructions	50
Pre-Trial Stipulation and Order of the Court..	40
Reporter's Transcript of Proceedings	83
Court's Instructions to Jury	581
Return on Non-Service of Writ by U. S. Mar- shal	74
Statement of Points Upon Which Appellant RKO Radio Pictures, Inc., Intends to Rely on Appeal	618
Statement of Points Upon Which Appellant Ann Sheridan Intends to Rely on Appeal....	621
Stipulation Designating Portions of Record To Be Printed	623
Stipulation Designating Record on Appeal....	79
Verdict on the Complaint	74
Witnesses, Defendant's:	
Banks, Polan	
—direct	460
Downes, Edward	
—direct	505

INDEX

PAGE

Witnesses, Defendant's—(Continued) :

Krieger, Carrie

—direct	494
—cross	498
—redirect	504

Rogell, Sid

—direct	402
—cross	426
—redirect	452

Schuessler, Fred E.

—direct	486
—cross	491

Sparks, Robert

—direct	327, 518
—cross	354, 381, 520
—redirect	386, 526
—recross	388

Stevenson, Robert

—direct	389, 528
—cross	396

Youngman, Gordon E.

—direct	470
—cross	482

Witnesses, Plaintiff's:

Banks, Polan

—direct	235, 255, 511
—cross	269
—redirect	291
—recross	299

Witnesses, Plaintiff's—(Continued) :

Hickox, Andrew

—direct 513

—cross 515

Lieber, Perry

—direct 160, 180

—cross 192

Schuessler, Fred

—direct 193

Sheridan, Ann

—direct 85, 113, 530

—cross 143, 302, 531

Youngman, Gordon E.

—direct 226

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant and Cross-Appellee:

MITCHELL, SILBERBERG & KNUPP,
GUY KNUPP,

603 Roosevelt Bldg.,
Los Angeles 14, Calif.

For Appellee and Cross-Appellant:

GANG, KOPP & TYRE,
MARTIN GANG,
MILTON A. RUDIN,

401 Taft Bldg.,
Los Angeles 28, Calif.

In the United States District Court, Southern
District of California, Central Division

No. 10585-C

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Cor-
poration,

Defendant.

AMENDED COMPLAINT FOR DAMAGES
FOR BREACH OF CONTRACT

For a First Cause of Action, Plaintiff Complains
and Alleges:

I.

Plaintiff is a resident and a citizen of the State
of California.

II.

At all times herein mentioned, defendant RKO
Radio Pictures, Inc., hereinafter referred to as
"RKO," or as "defendant" was, and now is, a
corporation duly organized and existing under and
by virtue of the laws of the State of Delaware and
duly licensed to do business, and doing business, in
the State of California, with its principal place of
business in said state in Los Angeles, California. [2*]

III.

The amount in controversy, exclusive of interest
and costs, is in excess of \$3,000.00.

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

IV.

On or about April 29, 1949, plaintiff and defendant RKO executed a contract in writing, hereinafter sometimes referred to as the "contract," under and by virtue of the terms of which defendant employed plaintiff, and plaintiff agreed to render her services as an actress to portray the leading female role in the photoplay entitled "Carriage Entrance" to be produced by RKO. Defendant RKO agreed to pay plaintiff for plaintiff's services during the first 16 weeks of the term of said employment, or such lesser period as might constitute the term thereof, and for all rights granted and/or agreed to be granted by plaintiff to defendant under said contract, the sum of \$150,000, plus a sum equal to 10% of the net profits derived by producer (defendant RKO) and its successors and assigns from the distribution of said motion picture "Carriage Entrance" accruing during the period of 10 years from and after the first general release of said motion picture "Carriage Entrance" in the United States.

V.

The term of artist's (plaintiff) employment under the contract was to commence on such date as RKO might specify in writing, which date, however, would not be earlier than June 1, 1949, nor later than July 6, 1949. Said term was to continue after the starting date thereof until plaintiff had completed all of her services in connection with principal photography of said photoplay "Carriage Entrance."

VI.

Said contract provided in paragraph 1 thereof that plaintiff might not be required to render services unless and [3] until plaintiff had approved each and all of the following:

(a) Final shooting script of the screenplay for "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

On April 29, 1949, plaintiff did approve the actor who would portray the leading male role in "Carriage Entrance"; and the director who would direct "Carriage Entrance"; and the final shooting script for the screenplay for "Carriage Entrance," which approval was delivered by plaintiff to defendant RKO in writing dated April 29, 1949.

VII.

Subsequent to April 29, 1949, defendant RKO caused the screenplay for "Carriage Entrance" which had been approved by plaintiff and by the actor named in the approval of plaintiff dated April 29, 1949, to be rewritten and revised. The rewritten and revised script for "Carriage Entrance" was subsequently submitted to the actor who had been approved by plaintiff on April 29, 1949, and said actor, plaintiff is informed and believes, refused to approve the changes made in the part to be portrayed by said actor and, therefore,

refused to proceed with his portrayal of the leading male role in "Carriage Entrance."

VIII.

Thereafter and from time to time up to and including August 16, 1949, plaintiff informed defendant RKO that plaintiff would and did approve of actors to portray the leading male role in said photoplay "Carriage Entrance." Among the actors named by plaintiff as actors of whom the plaintiff approved were the following: Franchot Tone, John Lund, Charles Boyer, Richard Conte and Robert Mitchum. Plaintiff is informed and believes, and on such information and belief alleges the fact [4] to be, that one or more of said actors was available and could have been obtained by defendant RKO to portray the leading male role in said photoplay, "Carriage Entrance."

IX.

At all times after April 29, 1949, plaintiff kept herself in readiness to perform her obligations in accordance with the terms of the contract with defendant, RKO, and ever since commencement of the term of said contract on July 6, 1949, plaintiff has been ready, able and willing to perform all of the terms of the contract to be performed by her, and plaintiff has fully performed all of the obligations of plaintiff under the contract up to and including August 17, 1949, the day on which defendant RKO purported to terminate the contract with plaintiff. Specifically and without limiting the generality of the foregoing, plaintiff

reported to the studio of defendant RKO and elsewhere as and when directed by defendant RKO to take part in conferences with the officers, executives and employees of defendant RKO in connection with said photoplay "Carriage Entrance"; at the direction and request of defendant RKO, plaintiff appeared, assisted in and took part in preparation of wardrobe for plaintiff, in the fitting of said wardrobe and in discussions concerning make-up and hairdress for plaintiff.

X.

On August 15, 1949, and again on August 16, 1949, plaintiff met with the officers and executives of defendant RKO for the purpose of discussing the selection of an actor to portray the leading male role in the photoplay "Carriage Entrance."

At said meetings plaintiff informed defendant RKO that after the revision of the script by defendant RKO which had resulted in the refusal of Robert Young to portray the leading male role, defendant RKO had submitted Franchot Tone as an actor to portray said leading male role in the photoplay [5] "Carriage Entrance"; that plaintiff had approved Franchot Tone as the actor to portray said leading male role; that plaintiff had been informed that Franchot Tone had agreed to portray said leading male role in said photoplay "Carriage Entrance" but that defendant RKO had thereafter refused to utilize the services of Franchot Tone in said photoplay "Carriage Entrance." Plaintiff further informed defendant RKO that plaintiff

would approve Robert Mitchum to portray the leading male role in said photoplay "Carriage Entrance"; that said Robert Mitchum was an actor in the employ of defendant RKO who would be available for the rendition of his services in the photoplay "Carriage Entrance" and plaintiff thereupon requested that defendant RKO assign the said Robert Mitchum to portray the leading male role in the photoplay "Carriage Entrance." Defendant RKO refused to grant the request of plaintiff and refused to assign Robert Mitchum to portray said leading male role.

XI.

At all times herein mentioned up to and including the meetings held on August 15, 1949, and August 16, 1949, plaintiff, in good faith, stated to defendant RKO that plaintiff would cooperate and plaintiff did cooperate with defendant RKO in seeking a suitable actor to portray the leading male role in the photoplay "Carriage Entrance."

XII.

On August 17, 1949, arbitrarily and unilaterally and without further discussion with plaintiff, defendant RKO terminated the contract and notified plaintiff that defendant RKO would not utilize the services of plaintiff in said photoplay "Carriage Entrance" and would not pay plaintiff any compensation whatsoever in connection with said photoplay. Plaintiff alleges that the aforesaid act of defendant RKO in terminating the contract was wrongful, without cause, was taken in bad [6]

faith, was arbitrary and unreasonable and constitutes a breach of contract by defendant RKO. By reason of the wrongful acts and conduct of defendant RKO and by reason of the breach of the contract by defendant RKO, plaintiff has been and is damaged in the sum of \$350,000.00.

For an Alternative, Separate and Second Cause of Action, but Only in the Event Plaintiff Does Not Recover on Her First Cause of Action, Plaintiff Complains and Alleges:

I.

Plaintiff is a resident and a citizen of the State of California.

II.

At all times herein mentioned, defendant RKO Radio Pictures, Inc., hereinafter referred to as "RKO" or as "defendant," was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly licensed to do business, and doing business, in the State of California, with its principal place of business in said state in Los Angeles, California.

III.

The amount in controversy, exclusive of interest and costs, is in excess of \$3,000.00.

IV.

During the period of time commencing some time prior to April 29, 1949, to and including August

16, 1949, defendant RKO stated, represented and promised to plaintiff as follows:

1. That defendant RKO would produce a motion picture photoplay entitled "Carriage Entrance."

2. That defendant RKO was employing and did thereby employ plaintiff to render her services as an actress to portray the leading female role in said motion picture photoplay [7] and would pay to plaintiff for her services, during the first 16 weeks of said employment, or such lesser period as might constitute the term of employment, and for all rights granted and/or to be granted by plaintiff to defendant in connection with the production of said photoplay, the sum of \$150,000, plus a sum equal to 10% of the net profits derived by defendant RKO and its successors and assigns from the distribution of said motion picture photoplay accruing during a period of 10 years from and after the first general release of said motion picture photoplay in the United States.

3. That the term of plaintiff's employment in connection with the production of said motion picture photoplay "Carriage Entrance" would commence on the date to be specified by defendant RKO in writing, which date, however, would not be earlier than June 1, 1949, or later than July 6, 1949; said term was to continue after the starting date thereof until plaintiff had completed all of her services in connection with principal photography of said motion picture.

4. That plaintiff would not be required to render her services unless and until plaintiff had approved each and all of the following:

(a) Final shooting script of the screenplay "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

V.

On April 29, 1949, plaintiff did approve the actor who would portray the leading male role in "Carriage Entrance"; and the director who would direct "Carriage Entrance"; and the final shooting script and screen play for "Carriage [8] Entrance," which approval was delivered by plaintiff to defendant RKO in writing dated April 29, 1949. Said actor so approved by plaintiff, agreed to render his services as an actor to portray the leading male role in said motion picture photoplay.

VI.

Subsequent to April 29, 1949, defendant RKO caused the screenplay for "Carriage Entrance" which had been approved by plaintiff and by the actor named in the approval of plaintiff dated April 29, 1949, to be rewritten and revised. The rewritten and revised script for "Carriage Entrance" was subsequently submitted to said actor who had been approved by plaintiff on April 29, 1949, and said actor, plaintiff is informed and believes, refused to

approve the changes made in the part to be portrayed by said actor and, therefore, refused to proceed with his portrayal of the leading male role in "Carriage Entrance."

VII.

Thereafter and from time to time up to and including August 16, 1949, plaintiff informed defendant RKO that plaintiff would and did approve of actors to portray the leading male role in "Carriage Entrance." Among the actors named by plaintiff as actors of whom plaintiff approved were the following: Franchot Tone, John Lund, Charles Boyer, Richard Conte and Robert Mitchum. Plaintiff is informed and believes, and on such information and belief alleges the fact to be, that one or more of said actors was available and could have been obtained by defendant RKO to portray the leading male role in said motion picture photoplay. At all times herein mentioned, plaintiff, in good faith, stated to defendant RKO that plaintiff would cooperate, and plaintiff did cooperate, with defendant RKO in seeking a suitable actor to portray the leading [9] male role in the motion picture photoplay "Carriage Entrance."

VIII.

On August 17, 1949, arbitrarily and unilaterally and without further discussion with plaintiff, defendant RKO notified plaintiff that defendant RKO would not utilize the services of plaintiff in said motion picture photoplay "Carriage Entrance" and

would not pay plaintiff any compensation whatsoever in connection with said motion picture photoplay.

IX.

Relying upon the hereinabove alleged statements, representations and promises of defendant RKO, at all times during said period commencing some time prior to April 29, 1949, up to and including August 16, 1949, plaintiff kept herself in readiness to render her services, and rendered services, as an actress for defendant RKO in connection with the production of the motion picture photoplay "Carriage Entrance," and plaintiff has been ready, willing and able to render her services as aforesaid in connection with the production of said motion picture photoplay and otherwise do everything necessary to be done by her, and has done everything necessary to be done by her, in connection with the production of said motion picture photoplay, except as prevented by defendant RKO. Specifically and without limiting the generality of the foregoing, plaintiff reported to the studio of defendant RKO and elsewhere as and when directed by defendant RKO to take part in conferences with the offices, executives and employees of defendant RKO in connection with said motion picture photoplay "Carriage Entrance"; and at the direction and request of defendant RKO, plaintiff appeared, assisted in, and took part in preparation of wardrobe for plaintiff, in the fitting of said wardrobe, and in discussions concerning make-up and [10] hair-dress for plaintiff, all of which things plaintiff would not have done, if plaintiff had not relied

upon the hereinabove alleged statements, representations and promises of defendant RKO and if defendant RKO had not made said statements, representations and promises.

X.

Relying upon the hereinabove alleged statements, representations and promises of defendant RKO, plaintiff refrained from entering into contracts for the rendition of her services as an actress in motion pictures during the period of time commencing April 29, 1949, and expiring 16 weeks from July 6, 1949, although plaintiff would have, and could have, entered into contracts to render her services as an actress in a motion picture during said period of time, for which plaintiff would have, and could have, received compensation in the amount at least equal to the amount defendant RKO promised to pay plaintiff for the services of plaintiff in the motion picture photoplay "Carriage Entrance."

XI.

At all times herein mentioned, up to and including August 16, 1949, defendant RKO by its conduct and by its hereinabove alleged statements, promises and representations, and with knowledge that plaintiff was relying upon its statements, representations and promises, encouraged and requested plaintiff to keep herself in readiness to render her services as an actress for defendant RKO in connection with the production of the motion picture photoplay "Carriage Entrance," to

refrain from entering into other contracts for the rendition of her services as an actress in motion pictures for the period of time commencing April 29, 1949, and expiring 16 weeks from July 6, 1949, and to render her services and do other acts necessary to prepare to render her services in said motion picture [11] photoplay, as hereinabove alleged.

XII.

With full knowledge on the part of defendant RKO of the change of position by plaintiff in reliance upon the hereinabove alleged statements, representations and promises of defendant RKO, defendant RKO has failed and refused, and did fail and refuse, to permit plaintiff to render her services as the leading female actress in the photoplay "Carriage Entrance" and defendant RKO has and did make it impossible for defendant RKO to comply with the statements, representations and promises made to plaintiff by defendant RKO, by producing a motion picture photoplay "Carriage Entrance" utilizing the services of an actress other than plaintiff in the leading female role in said motion picture photoplay.

XIII.

Plaintiff would not have refrained from entering into a contract to render her services as an actress in a motion picture photoplay other than "Carriage Entrance" during a period of 16 weeks commencing July 6, 1949, if plaintiff had not relied upon the hereinabove alleged statements, representations and

promises of defendant RKO, and if defendant RKO had not made such statements, representations and promises and had not encouraged and requested plaintiff to so refrain from entering into a contract for the rendition of her services.

XIV.

As a direct consequence of plaintiff's reliance on the statements, representations and promises of defendant RKO, and defendant RKO's failure to utilize plaintiff's services as an actress in connection with the production of the photoplay "Carriage Entrance," as hereinabove alleged, plaintiff has suffered a detriment in the sum of \$250,000.00 and has been damaged in that sum. [12]

Wherefore, plaintiff prays judgment as follows:

1. On the first cause of action, in the sum of \$350,000.00.
2. On the second cause of action, but only in the event plaintiff fails to recover on the first cause of action, in the sum of \$250,000.00.
3. For costs of suit herein and for such other relief as may be proper.

GANG, KOPP & TYRE,

By /s/ ROBERT E. KOPP,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 18, 1950. [13]

[Title of District Court and Cause.)

ANSWER AND COUNTERCLAIM

Now comes the defendant, RKO Radio Pictures, Inc., and for answer to the amended complaint herein, denies, admits and alleges as follows:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Answering paragraph IV, admits that on or about April 29, 1949, plaintiff and defendant made, executed and delivered a contract in writing, and alleges that attached hereto, marked Exhibit "A" and [27] hereby referred to and made a part of this answer as fully as though incorporated herein, is a full, true and correct copy of said contract. Admits all of the allegations of said paragraph IV insofar as said allegations accord with the terms and provisions of said contract, and denies each allegation of said paragraph not in accord with the terms and conditions of said contract.

V.

Answering paragraph V of said complaint, denies each and every allegation therein contained, except to the extent that said allegations are shown to be true by the said written contract hereunto annexed.

VI.

Answering paragraph VI, except to the extent that the allegations of said paragraph are in accord with the terms and conditions of said contract, defendant denies all of the allegations of paragraph VI. Alleges that on April 29, 1949, plaintiff approved, in writing, one Robert Young to portray the leading male role in "Carriage Entrance" and in and by said writing agreed that the defendant should not be obligated to assign said Robert Young to portray the leading male role in said picture, but that any other individual proposed by defendant to portray the leading male role in said picture should be subject to the approval of said plaintiff; that said Robert Young was, on said date, under contract to the defendant to render his services as a motion picture actor, but only in such role as might be approved by said Robert Young. Said Robert Young refused to portray the leading male role in said picture, and no person proposed by defendant was approved by the plaintiff to portray said role.

VII.

Answering paragraph VII, said defendant denies that the [28] plaintiff ever approved any screen play for "Carriage Entrance," other than as shown and to the extent set forth in the contract between the parties, or that said actor named in the approval of said plaintiff ever approved said screen play. Admits that said actor, on or about the 7th day of July, 1949, notified and advised defendant that he did not approve said screen play and that

he would not portray a role therein, and alleges that said actor refused to perform said role.

VIII.

Answering paragraph VIII, said defendant admits that plaintiff at different times suggested the name of Franchot Tone and the names of the other persons named in paragraph VIII were mentioned to portray the leading male role in the photoplay "Carriage Entrance," but alleges that neither Franchot Tone nor any other person suggested by plaintiff, or named in said paragraph, was ever proposed by defendant as an actor to portray the leading male role in said photoplay. Alleges that defendant from time to time proposed to plaintiff the names of actors to portray the leading role in said picture, and notified plaintiff that if she would approve one of said actors, such actor would be assigned to said role and employed by the defendant. Each and all of the persons so designated by the defendant were actors of great experience and ability and well qualified to portray said role in said picture. The plaintiff refused to approve any of said actors so proposed by defendant, and the refusal of said plaintiff to approve either or any of the persons so proposed by defendant was capricious, unwarranted, unreasonable, and without excuse or justification.

IX.

Answering paragraph IX, said defendant admits that plaintiff, at her suggestion and prior to the approval by plaintiff of any person to portray the

leading male role in said photoplay, appeared at the [29] studio of defendant and assisted and took part in the preparation of a wardrobe for the plaintiff, in the fitting of said wardrobe, and in discussions concerning make-up and hairdress for plaintiff.

Except as admitted, defendant denies each and every allegation in paragraph IX contained.

X.

Answering paragraph X, defendant admits that on August 15, 1949, and on August 16, 1949, plaintiff met with officers and executives of defendant for the purpose of discussing the selection of an actor to portray the leading male role in "Carriage Entrance" and that plaintiff stated to defendant that she would approve Franchot Tone as the actor to portray said leading male role, and alleges that defendant never proposed Franchot Tone to portray said role and refused to utilize the services of Franchot Tone or to assign him to portray said leading male role.

Except as herein admitted, defendant denies each and every allegation in said paragraph contained.

XI.

Answering paragraph XI, said defendant denies each and every allegation therein contained.

XII.

Answering paragraph XII, defendant admits that on August 17, 1949, defendant notified plaintiff that defendant would not utilize the services of plaintiff in said photoplay and would not pay her any compensation in connection therewith.

Except as herein admitted, defendant denies each and every allegation contained in said paragraph XII, and denies that plaintiff has been or is damaged by the or any wrongful or other acts or conduct, or by reason of any breach of contract by defendant or otherwise, in the sum of \$350,000.00 or any other sum or amount. [30]

For Answer to the Alternative, Separate and Second Cause of Action Set Forth in Said Complaint, Defendant Denies, Admits and Alleges as Follows:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Answering paragraph IV, defendant alleges that on or about the 29th day of April, 1949, plaintiff and defendant entered into a written agreement under the terms of which the defendant employed the services of the plaintiff upon the terms and conditions set forth in said written agreement, and a copy of said written agreement is annexed hereto, made a part hereof and marked Exhibit "A"; that all the statements, representations and promises made by defendant to said plaintiff were and are

incorporated in said written agreement and made a part thereof, and that no statements, representations or promises were made by defendant to plaintiff other than those set forth in said agreement.

Except to the extent that the allegations of said paragraph IV are shown to be true by the terms and provisions of said written agreement, said defendant denies each and all the allegations contained in said paragraph IV.

V.

Answering paragraph V, defendant admits that on or about April 29, 1949, plaintiff did approve one Robert Young as an actor to portray the leading male role in "Carriage Entrance"; alleges [31] that said Robert Young was then under written contract to the defendant to perform his services as an actor for defendant and that said contract provided that said Robert Young should have the approval of any role to which he might be assigned, and could not be required to perform any role of which he did not approve. Said Robert Young refused to approve the leading male role in "Carriage Entrance" or to perform his services therein.

Except as herein alleged, defendant denies each and every allegation in said paragraph V contained.

VI.

Answering paragraph VI, defendant admits that subsequent to April 29, 1949, defendant caused the screen play for "Carriage Entrance" to be rewritten and revised, and that the rewritten and revised

script for "Carriage Entrance" was subsequently submitted to said Robert Young and said Robert Young refused to portray the leading male role in "Carriage Entrance."

Except as herein admitted, defendant denies the allegations of said paragraph VI.

VII.

Answering the allegations contained in paragraph VII, defendant admits that plaintiff suggested Franchot Tone and the names of the other persons named in said paragraph were mentioned as an actor to portray the leading male role in "Carriage Entrance," but alleges that neither Franchot Tone nor any other person named in said paragraph or suggested by plaintiff was ever proposed by defendant to portray said role.

Except as hereinabove admitted, defendant denies the allegations contained in paragraph VII.

VIII.

Answering paragraph VIII, admits that defendant on August 17, [32] 1949, notified plaintiff that the defendant would not utilize the services of plaintiff in the motion picture photoplay "Carriage Entrance" and would not pay plaintiff any compensation whatsoever in connection with said motion picture photoplay.

Except as herein admitted, defendant denies the allegations of said paragraph VIII.

IX.

Answering the allegations of paragraph IX, de-

fendant admits that plaintiff, at her suggestion and prior to the approval by plaintiff of any person to play the leading male role in said photoplay, appeared at the studio of defendant and assisted in and took part in the preparation of the wardrobe of said plaintiff, in the fitting of said wardrobe and in discussions concerning make-up and hairdresses for the plaintiff.

Except as herein admitted, defendant denies the allegations of said paragraph IX.

X.

Answering paragraph X, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

XI.

Answering paragraph XI, defendant denies the allegations therein contained.

XII.

Answering paragraph XII, defendant admits that it has produced the motion picture photoplay "Carriage Entrance" and has utilized the services of an actress other than defendant in the leading female role in said motion picture photoplay.

Except as herein admitted, defendant denies the allegations of said paragraph XII.

XIII.

Answering paragraph XIII, defendant denies the allegations therein contained. [33]

XIV.

Answering paragraph XIV, defendant denies the allegations therein contained and denies that plaintiff has suffered detriment in the sum of \$250,000 or in any other amount, or has been damaged in that sum or in any other sum or amount.

For a Further, Separate and Additional Defense to the Causes of Action Set Forth in Said Complaint and to Each Thereof, Defendant Alleges:

I.

Plaintiff and defendant on April 29, 1949, made and entered into a written contract, a copy of which said contract is hereunto annexed, made a part hereof and marked Exhibit "A."

II.

Said contract, and paragraph 29 thereof, provides as follows:

"29. Producer shall not be required to use Artist's services hereunder or to complete the production of 'Carriage Entrance,' and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

III.

Until the termination of said contract, as hereinafter alleged, defendant duly kept and performed each and all the terms, conditions and covenants of said contract on its part to be kept and performed. [34]

IV.

On April 29, 1949, plaintiff in writing approved Robert Young as the actor to portray the leading male role in "Carriage Entrance," but such writing provided that defendant should not be obligated to assign Robert Young to said role, and that any other person proposed for said role by defendant should be subject to the approval of plaintiff. Robert Young refused to portray said role in said photoplay and had, under his contract with defendant, the right to refuse said role. Subsequent to the execution of said contract, defendant from time to time proposed to the plaintiff the names of certain persons to portray the leading male role in said photoplay. Each of the persons whose names were so submitted to said plaintiff were well known motion picture actors, and each and all of said persons were qualified, capable, talented and experienced motion picture actors and well suited for the performance of the leading male role in the photoplay "Carriage Entrance," and defendant proposed the name of each of said persons to said plaintiff in an honest and conscientious endeavor to secure the approval of plaintiff of a suitable actor to portray the leading male role in "Carriage Entrance," and in order to complete the production of said

motion picture photoplay and utilize the services of plaintiff therein.

V.

Plaintiff, without reason or justification, arbitrarily and unreasonably, refused to approve any person so proposed by defendant to perform the leading male role in the photoplay "Carriage Entrance," and on or about the 17th day of August, 1949, defendant, because of the refusal of plaintiff to approve the person to play the leading male role in said photoplay, terminated said written agreement and plaintiff never became obligated to and did not render any services pursuant to the terms of said written contract. [35]

Counterclaim

Defendant files this, its counterclaim against plaintiff, and for cause of counterclaim alleges:

I.

Defendant is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with a place of business in the City of Los Angeles, California.

II.

Plaintiff is and at all times herein mentioned was, a resident and citizen of the State of California.

III.

The amount in controversy in this counterclaim, exclusive of interest and costs, is in excess of the sum of \$3,000.00.

IV.

On or about April 29, 1949, defendant and plaintiff made and entered into a written contract under the terms of which contract plaintiff agreed, upon the terms and conditions set forth in said contract, to perform and render services for defendant as a motion picture actress in a motion picture photoplay entitled "Carriage Entrance." A true copy of said written contract is annexed to the answer herein, marked Exhibit "A," and is hereby referred to, incorporated in and made a part of this counterclaim.

V.

At all times prior to the termination of said contract, as herein alleged, defendant duly kept and performed each and all of the terms, covenants and conditions of said contract on its part to be kept and performed.

VI.

Immediately after the execution of said contract, defendant [36] entered upon preparations for the production of said photoplay and secured and employed in the production of said photoplay, the necessary producer, writers, members of the cast, production staff, cameramen, art director and wardrobe designer, and actively engaged in and made preparations for the production of said photoplay upon the assumption that the leading female role therein would be portrayed by the plaintiff pursuant to the terms of said contract.

VII.

Defendant, after the execution of said contract

and prior to August 17, 1949, in an endeavor to secure the approval of plaintiff of an actor to portray the leading male role in said photoplay, from time to time proposed to plaintiff the names of a number of motion picture actors. Each of the persons whose name was so proposed by defendant to plaintiff was a well known, capable, talented and experienced motion picture actor, and each and all of the persons whose names were so submitted were persons eminently qualified and capable of performing in a satisfactory manner the leading male role in said photoplay, and each of said names was so proposed to plaintiff in good faith and an honest and conscientious endeavor to designate and select a person of whom the plaintiff would approve in order that the production of said photoplay might be completed.

VIII.

Plaintiff arbitrarily, capriciously, unreasonably and without cause or justification, refused and continued to refuse to approve any person proposed by the defendant to portray said leading male role, or to approve any person except such person as she might select and designate. [37]

IX.

By reason of the failure and refusal of said plaintiff to approve the actor who would portray the leading male role in said photoplay, defendant was unable to utilize the services of plaintiff in said photoplay and was compelled to and did, on the 19th day of August, 1949, terminate said written contract. In preparing to produce said photoplay and

use the services of plaintiff therein to portray the leading female role, defendant incurred costs and expenses and paid out and expended a large sum of money which it would not have paid out and expended had plaintiff in good faith cooperated with defendant in designating and selecting an actor to portray the leading male role, and had performed her services in portraying the leading female role. The amount so paid out and expended and the costs so incurred was and is the sum of \$72,686.39 in excess of the amount which defendant would have paid out, expended and incurred had plaintiff, in good faith, performed the terms and conditions of said contract on her part to be kept and performed. By reason of the wrongful, unreasonable and unjustified failure and refusal of said plaintiff to approve an actor to portray the leading male role in said photoplay, defendant has been and is damaged in the sum of \$72,686.39.

Wherefore, plaintiff prays that the plaintiff take nothing by her complaint hereunder and that defendant have and recover upon its counterclaim the sum of \$72,626.39, together with its costs of suit herein incurred.

MITCHELL, SILBERBERG &
KNUPP, and
GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Defendant and
Counterclaimant.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Plaintiff answers defendant's counterclaim on file herein as follows:

I.

Admits the allegations of Paragraph I of said counterclaim.

II.

Admits the allegations of Paragraph II of said counterclaim.

III.

Admits the allegations of Paragraph III of said counterclaim.

IV.

Admits the allegations of Paragraph IV of said counterclaim. [55]

V.

Denies, generally and specifically, each and every allegation contained in Paragraph V of said counterclaim.

VI.

Answering Paragraph VI of said counterclaim, plaintiff admits that immediately after the execution of said contract between plaintiff and defendant, dated April 29, 1949, defendant entered upon preparations of the production for said motion picture photoplay entitled "Carriage Entrance." Plaintiff denies that defendant secured and employed in the production of said photoplay, the necessary members of the cast and further denies that, at all times mentioned in said Paragraph VI, defendant

actively engaged in and made preparations for the production of said photoplay upon the assumption that the leading female role therein would be portrayed by the plaintiff.

VII.

Answering Paragraph VII of said counterclaim, plaintiff admits that defendant, after the execution of said contract and prior to August 17, 1949, from time to time proposed to plaintiff the names of a number of motion picture actors to portray the leading male role in said photoplay. Except as herein expressly admitted, plaintiff denies, generally and specifically, each and every allegation contained in said Paragraph VII.

VIII.

Denies, generally and specifically, each and every allegation contained in Paragraph VIII of said counterclaim.

IX.

Denies, generally and specifically, each and every allegation contained in Paragraph IX of said counterclaim.

Wherefore, plaintiff prays that defendant take nothing by its counterclaim herein, and that plaintiff [56] have and recover judgment as prayed for in her amended complaint on file herein.

GANG, KOPP & TYRE,

By /s/ MARTIN GANG,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 8, 1950. [57]

[Title of District Court and Cause.]

MEMORANDUM FOR COUNSEL

Since the court does not find itself entirely in agreement with either attorney for the plaintiff or attorney for the defendant, concerning the interpretation of the contract of April 29, 1949, this memorandum analyzing the contract is prepared for counsel and the matter will be set down for further pre-trial.

In order to test what the contract means, the court proposes to look at the contract as of definite periods of time.

1. As of April 29, 1949.

On that date the producer employed the artist as an actress for the photoplay "Carriage Entrance." (Par. 1.)

The artist accepted the employment. (Par. 3.)

(a) Suppose the artist on April 30th, had informed the producer that she was going to accept other employment. The producer would have contended that a contract existed and would have legally restrained her or sued in damages for breach of contract. [60]

(b) If the producer on April 30th had informed the artist he was not going to use her services, this would have been a breach of the contract, but Sec. 29 provided that the producer would have been deemed to have fully performed by paying the artist the "minimum" compensation payable to the artist under the contract.

In this situation the meaning of the term "mini-

minimum compensation" would be subject to interpretation and the contract would be ambiguous as to what the "minimum compensation" was, and evidence to explain the term would be admissible. As stated hereafter, the court doubts if this issue will become pertinent to the case.

2. The Agreement to Approve Script, Director and Actor.

The contract provided that the artist should not be required to render any services pursuant thereto until she had approved the script, the director and the actor. Since this term implies that the producer would submit these matters to the actress, the contract therefore means that the parties were to agree on the script, director and actor before the actress would be required to render services under the contract.

Every contract contains the implied covenant that the parties will act in good faith and so the court concludes that the agreement to agree on these three items implied that the producer would submit them in good faith and the actress would approve or disapprove in good faith.

We have, therefore, a contract which, although binding the producer and actress from April 29th, still left something to be done before the actress was to start her services. Both counsel and the court are in agreement that the issue of good faith is an issue in this case and that a [61] breach of the good faith covenant by either the producer or the actress would constitute a breach.

3. The Effect of the Notice From RKO to Sheridan on August 17, 1949.

The notice states in part, "The term of your employment under said agreement of employment commenced on July 6th, 1949." The court is in agreement that this is the legal situation under the contract except that under paragraph 12 the artist agreed to report at the producer's studio for not exceeding one week prior to the starting date of the term of employment. Depending on the facts shown at the trial the actual term of employment may have started one week prior to July 6th, 1949.

The notice states further, "By reason of your failure to approve an actor to portray the leading male role in said photoplay, we will not utilize your services in said photoplay and we will not pay you any compensation whatsoever in connection therewith."

The actress had either breached or had not breached the contract on August 17. If she had breached the contract, the producer was within his rights to excuse his own performance and to give the notice of August 17th.

If the actress had not breached the contract then the producer nevertheless had the right to elect not to use the actress' services and to fully perform by tendering her the "minimum compensation." This is not what the producer did nor is it what the producer said in the notice.

In other words, it appears to the court that the producer, on August 17th, may have elected to take

the position that the actress had breached her contract and if, in fact, she had not breached her contract, then the producer himself was guilty of an anticipatory breach by giving the [62] notice and would be liable for damages.

It does not appear to the court that the paragraph involving the payment of minimum compensation is called into play, since the producer did not rely on it and did not attempt to fully perform as he could have done by paying the "minimum compensation," but instead he elected to consider the actress as having breached the contract. The court does not see that the clause on minimum compensation is an issue and there would be no point in taking evidence on the meaning of minimum compensation, even assuming that the term is ambiguous.

4. Interpretation of Section 29.

Section 29 contains two sentences. The first sentence contains the disjunctive "or" and the second sentence contains the conjunctive "and." As to the first sentence, it would appear that depending on the facts produced at the trial the producer has used the artist's services for the week preceding the starting date of July 6th, 1949.

As to the second sentence, the "and" is pertinent because the sentence expressly provides that if the artist does not become obligated to render service because she did not approve the items in paragraph 1 and does not render any service pursuant to the contract the producer is not required to pay any compensation.

If the producer actually used or had the benefit of the actress' services (as for example, the week

preceding the formal start of employment referred to in paragraph 12), it would seem that the producer could not avail himself of the provisions of the second sentence of paragraph 29, in view of the conjunctive "and" used therein. [63] It would seem that only in those cases where the artist does not approve the items specified in paragraph 1, and does not render any services under the contract, is the producer relieved from paying compensation to the artist.

It is difficult to say whether the producer can rely on his notice of August 17th except on the proposition that the artist prior to that time had breached her contract and he would have to stand or fall on the jury's finding of that question of fact.

There is probably presented a question of fact for submission to the jury as to whether the producer waived his right to pay "minimum compensation" as full performance.

5. Interpretation of Section 21.

A breach by the actress gives the producer a right to suspend and also terminate the agreement. No compensation was to be paid during any period of suspension. Does the fact that the producer never suspended or terminated, become material on the question of fact as to whether or not there was a breach by the actress on or prior to August 17th?

Because of the court's tentative views on the matters set forth above, it is suggested that the matter be set down for further pre-trial hearing. Thursday, December 21st, would probably be a sat-

isfactory date, either in the morning or afternoon. Counsel will confer and advise the clerk if this date is satisfactory.

/s/ JAMES M. CARTER,
U. S. District Judge.

12-13-50

Copies mailed to counsel 12/13/50.

[Endorsed]: Filed December 13, 1950. [64]

[Title of District Court and Cause.]

MEMORANDUM TO COUNSEL
RE PRE-TRIAL ORDER

With reference to the matters discussed at pre-trial, the court herewith indicates its rulings so that counsel may prepare a pre-trial stipulation and order, setting forth the stipulated facts and the issues for the trial of the action:

(1) The court concludes: That paragraph 29 of the contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be “* * * considered as an integral part of the whole contract,” as indicated in the language of the Lorentz case; and that in the circumstances listed in the first sentence of paragraph 29, the obligation of the studio, if any, could be liquidated by the payment of “minimum compensation”;

(2) That the second phrase in the first sentence of paragraph 29 of the contract reading, “or to

complete the [65] production of 'Carriage Entrance,'" should be read as follows: "or to complete the production of 'Carriage Entrance' with the artist." It appears to the court that both parties must have contemplated that the paragraph should have had this meaning;

(3) That the contract is not so ambiguous as to the meaning of "minimum compensation" that it becomes necessary to go outside of the four corners of the contract to ascertain the meaning of the words, "minimum compensation." The court concludes that they mean \$50,000.00;

(4) That there is in issue in the case, the question as to whether the artist is entitled to nothing under the second sentence of paragraph 29, or whether the artist is entitled to compensation for breach of contract; recovery, however, to be limited to the sum of \$50,000.00;

(5) There is in issue the question of whether the defendant is entitled to recover on its counterclaim;

(6) There is also in issue by the agreement of the parties, the question of good faith on the part of both the plaintiff and the defendant, in their actions under and concerning the contract;

(7) That the first sentence of paragraph 29 does not contain such concurrent obligations so that only by the payment of the minimum compensation can the studio avail itself of that portion of the contract;

(8) That the question of election is not in the case, since at all times the studio had a right to rely on the first sentence of paragraph 29 and to fully perform its obligations by paying minimum compensation. Since this right was available at all times, the notice of the studio, pursuant to the second sentence of paragraph 29, does not constitute such an election as would prevent the studio from concurrently or thereafter, relying on the first sentence of [66] paragraph 29.

Counsel for the plaintiff will present within seven days, a pre-trial stipulation and order, simplifying the facts and issues in this case, pursuant to the rules of this court.

Dated: January 18, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed January 18, 1951. [67]

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION AND ORDER OF THE COURT

Pursuant to order of court dated January 18, 1951, there is herewith submitted a pre-trial stipulation and order for the purpose of simplifying the facts and issues in the above-entitled case.

I.

It is stipulated that the record made in the course

of pre-trial proceedings shall be deemed a part of the record made upon the trial of this cause; provided, however, that any statement upon pre-trial concerning possible settlement of the litigation or of any claim involved therein shall not, without written consent of all parties appearing, be included in any record of the pre-trial proceedings.

II.

Documents

Plaintiff and defendant hereby stipulate that [68] the following documents may be offered in evidence; that they are either originals or true and correct copies of originals which may be used in place of the originals; that each of the documents herein described and offered in evidence is genuine; that those documents which appear to be executed actually were executed by the parties and were and are valid agreements; that all letters were sent on or about the date shown thereon and were received by the addressee in due course.

1. The Contract dated April 29, 1949.

2. A letter dated April 29, 1949, signed by plaintiff, addressed to defendant. It is stipulated that this letter was executed and delivered by plaintiff to defendant contemporaneously with the execution and delivery of the Contract.

3. A letter dated June 29, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

4. A letter dated July 8, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

5. A letter dated July 11, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

6. A letter dated July 25, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

7. A letter dated August 13, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President, attached to which is a copy of the final budget of the motion picture "Carriage Entrance."

8. Letter of termination dated August 17, 1949, from defendant to plaintiff.

III.

Facts

The parties stipulate that the following facts [69] are true:

1. Plaintiff is a resident and a citizen of the State of California.

2. Defendant is a Delaware corporation doing business in the State of California, with its principal place of business in Los Angeles, California.

3. The amount in controversy, exclusive of interest and costs is in excess of \$3,000.00.

4. Plaintiff and defendant executed and delivered the Contract; when the Contract was exe-

cuted and delivered plaintiff had approved the following:

(a) The script for the screenplay.

(b) The director.

(c) Robert Young as the actor who would portray the leading male role in "Carriage Entrance," by a letter dated April 29, 1949, the last paragraph of which reads as follows:

"This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in 'Carriage Entrance.' You shall not be obligated to assign him to portray the leading male role in the Picture, but any other individual proposed by you to portray the leading male role in the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement."

Said letter was prepared by defendant.

5. After April 29, 1949, defendant caused the screenplay for the picture to be revised.

6. The term of employment of plaintiff under the Contract commenced July 6, 1949.

7. By letter dated July 7, 1949, defendant submitted [70] to Robert Young a screenplay entitled "Carriage Entrance" for approval as the basic story for the next Picture provided for in the employment agreement with Mr. Young dated September 13, 1945. The role proposed for Mr. Young was named therein as "Quentin Cushing" subsequently changed to "Mark Lucas." In reply thereto, by letter dated July 11, 1949, Robert Young notified defendant that

he rejected and disapproved the submitted story. Said notification was sent by registered mail addressed to defendant and received on or about July 12, 1949.

Paragraph 3 of the employment agreement of September 13, 1945, between defendant and Robert Young provides that each picture in which Robert Young appears shall be based upon an approved basic story to be submitted to Mr. Young by defendant. Such basic stories may be in the form of synopses, treatments, stories, books, plays or in any other literary form. Mr. Young agreed to notify defendant in writing within five days after submission of his approval or disapproval of the proposed story. Mr. Young agreed to exercise such right of approval reasonably and in good faith.

8. Between July 11, 1949, or shortly thereafter, up to and including August 16, 1949, plaintiff discussed with defendant proposed replacements for Robert Young as the actor to portray the leading male role in the picture.

9. By written notice dated August 17, 1949, defendant notified plaintiff that it would not utilize plaintiff's services in the picture and would not pay plaintiff any compensation whatsoever in connection therewith.

The next four statements of fact are objected to by defendant on the ground of immateriality, irrelevancy and inadmissibility and the objection of defendant has been overruled.

10. Defendant did produce the motion picture

photoplay [71] entitled "Carriage Entrance." Principal photography of said photoplay was commenced by defendant on October 3, 1949, and was completed on November 16, 1949.

11. Defendant utilized the services of Ava Gardner to portray the leading female role in the picture in place of plaintiff.

12. Defendant used Robert Mitchum as the actor to portray the leading male role in the picture.

13. Defendant has not caused the motion picture "Carriage Entrance" to be exhibited.

The following facts are stipulated to as correct, but defendant has objected to their materiality, which objection has been overruled. Said facts are offered in evidence by plaintiff in connection with the issue of defendant's good faith.

14. Defendant in 1948 negotiated with Polan Banks and a corporation controlled by Polan Banks for the financing and distribution of a motion picture to be produced by Polan Banks and a corporation controlled by him based upon the story "Carriage Entrance," starring Ann Sheridan.

15. A written agreement was entered into between Polan Bank Productions, Inc., and defendant as a result of said negotiations.

16. A dispute arose between Polan Banks Productions, Inc., and defendant, as a result of which Polan Banks Productions, Inc., commenced a law suit against defendant for breach of contract, which

was filed on or about March 25, 1949, in the Superior Court of the State of California in and for the County of Los Angeles, being number 557,544 in the files of said court.

17. Subsequently, and on or about April 29, 1949, said litigation was compromised, settled [72] and subsequently dismissed by virtue of an agreement between Polan Bank Productions, Inc., and defendant under which defendant instead of financing and distributing the picture "Carriage Entrance" acquired ownership of the literary property and entered into a contract of employment with Polan Banks to act as the producer of the motion picture for defendant and entered into the Contract dated April 29, 1949, employing Ann Sheridan to portray the leading female role in the picture.

IV.

Issues Proposed by Plaintiff and Excluded by Rulings of the Court

1. What is the meaning of the phrase "minimum compensation" in the first sentence of Paragraph 29 of the Contract?

At the trial plaintiff will question the witnesses with reference to the meaning of the phrase "minimum compensation"; objections to such questions will be made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

2. Did the first sentence of Paragraph 29 of the Contract become operative?

Plaintiff contended that the first sentence of Paragraph 29 never became operative; that defendant elected not to take advantage of the provisions thereof if defendant had such right since defendant's notice of termination of August 17, 1949, was an election by defendant; that assuming defendant had the right to rely on the first sentence of Paragraph 29, defendant did not do so since defendant did not pay or offer to pay plaintiff the sum of \$50,000 or any other sum whatever.

3. On the question of damages, plaintiff contended [73] that plaintiff should be permitted to introduce evidence of damages in the amount of \$150,000.00, plus 10% of the profits which the picture would have earned if defendant had not breached the contract.

At the trial plaintiff will question the witnesses with reference to the damages sustained by plaintiff; objections to such questions will be made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

V.

Rulings of Law by the Court

In connection with the foregoing matters, the court has ruled as a matter of law as follows:

1. That Paragraph 29 of the Contract, and par-

ticularly the first sentence thereof, is to be interpreted so that the sentence be considered as an integral part of the whole contract and that the obligation of defendant, if any, could be liquidated by the payment of "minimum compensation."

2. That the second phrase in the first sentence of Paragraph 29 reading, "or to complete the production of 'Carriage Entrance'" should have added to it the phrase "with the artist" and is to be read as though said phrase appeared in the Contract.

3. That the phrase "minimum compensation" as it appears in the Contract is not so ambiguous as to meaning so as to make it necessary to go outside of the four corners of the Contract to ascertain the meaning of the words and the court states as a matter of law that the phrase "minimum compensation" means \$50,000.00.

4. That defendant at all times had a right to rely [74] on the first sentence of Paragraph 29 of the Contract and to fully perform its obligations by paying "minimum compensation" and that such right was available to defendant at all times.

5. That the first sentence of Paragraph 29 of the Contract does not contain such contractual obligations so that only by the payment of the minimum compensation can the defendant avail itself of that portion of the Contract.

The court having ruled as aforesaid, it is hereby ordered that this pre-trial order and all of the matters and things set forth herein, including the

rulings of the court, and the reporter's transcript of the pre-trial proceedings, shall be made a part of the record of this trial and shall serve as a portion of the original record upon any appeal which may be taken.

This pre-trial order was prepared pursuant to the memorandum to counsel re pre-trial order dated January 18, 1951. The matters stated to be stipulated by the parties are hereby stipulated to.

Dated: January 30, 1951.

GANG, KOPP & TYRE,

By /s/ MARTIN GANG,

Attorneys for Plaintiff.

MITCHELL, SILBERBERG &
KNUPP,

By /s/ GUY KNUPP,

Attorneys for Defendant.

The foregoing pre-trial stipulation and order is hereby approved and confirmed; all orders set forth therein are hereby made by the court as of the date hereof.

Dated: January 30, 1951.

/s/ JAMES M. CARTER,

U. S. District Judge.

[Endorsed]: Filed January 30, 1951. [75]

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

Plaintiff respectfully requests that the following instructions be included in the Court's charge to the jury.

GANG, KOPP & TYRE,
By /s/ MARTIN GANG,
Attorneys for Plaintiff. [76]

Plaintiff's Instruction No. 6

If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then you must determine the damages plaintiff has suffered as a direct and proximate result of defendant's wrongful act.

The contract provided that plaintiff was to receive two main types of compensation:

1. Flat compensation in the sum of \$150,000.00, of which \$50,000.00 was to be paid to plaintiff one week after commencement of principal photography of the motion picture "Carriage Entrance" and the balance of which, in the sum of \$100,000.00, was to be paid to plaintiff out of the "gross receipts" of the picture, as this term is defined in the agreement.

2. In addition, plaintiff was to receive 10% of the net profits of the picture.

The verdict for plaintiff should compensate her for both elements of her compensation.

You are not to be concerned with the first sentence

of paragraph 29 of the agreement between plaintiff and defendant or the meaning of "minimum compensation, but you should consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of \$50,000.00 which was payable one week after commencement of principal photography of the picture "Carriage Entrance," but instead the entire flat compensation amounting to \$150,000.00. In addition, you should also estimate the probable value of plaintiff's 10% interest in the net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed [85] with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of \$150,000.00.

Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, if the picture would have earned net profits and if so, you must also decide how much plaintiff's 10% interest in such net profits would probably have amounted to.

The verdict for plaintiff should compensate her

for all damage she has suffered by reason of defendant's acts, including the damage based upon her flat compensation and the damage measured by her percentage interest in the net profits of the picture.

Requested by Plaintiff and

.....

Judge.

Bigelow v. RKO Radio Pictures,

327 U. S. 251, 66 S. Ct. 574;

Speegle v. Board of Fire Underwriters,

29 Cal. 2d 34, 172 P. 2d 867;

Pacific v. Alaska Packers Association,

138 Cal. 632; Sobelman v. Maier, 203 Cal. 1.

Plaintiff's Instruction No. 6

(Alternate)

(This instruction is requested only if plaintiff's instruction No. 6 is refused.)

If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then in arriving at the measure of the damages directly and proximately caused by defendant's wrongful act, you will render a verdict for plaintiff in the amount of the "minimum compensation," unless you find that defendant has waived its right to rely on the first sentence of paragraph 29 of the contract.

The word "Waiver" in law means an intentional relinquishment of a known right and you will consider whether the Notice of Termination to plaintiff dated August 17, 1949, stating that by reason of plaintiff's failure to approve an actor to portray the leading male role in the picture, defendant would not use plaintiff's services and would not pay plaintiff any compensation, constituted an intentional relinquishment on the part of the defendant of its right to "be deemed to have fully performed by paying to plaintiff the minimum compensation." If you find that defendant has waived its right to rely on this first sentence of paragraph 29, then in arriving at the damages suffered by plaintiff you will pay no consideration to paragraph 29 but you will consider what plaintiff would have received under the contract if the picture had been made with plaintiff in the leading female role.

The contract provided that plaintiff was to receive two main types of compensation:

1. Flat compensation in the sum of \$150,000.00, of which \$50,000.00 was to be paid to plaintiff one week after commencement of principal photography of the motion picture "Carriage Entrance" and the balance of which, in the sum of \$100,000.00, was to be paid to plaintiff out of the "gross receipts" of the picture, as this term is defined in the agreement. [87]

2. In addition, plaintiff was to receive 10% of the net profits of the picture.

The verdict for plaintiff should compensate her for both elements of her compensation.

If you find that defendant waived its right to rely on the first sentence of paragraph 29 of the agreement, you must consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of \$50,000.00 which was payable one week after commencement of principal photography of the picture "Carriage Entrance," but instead the entire flat compensation amounting to \$150,000.00. In addition, you should also estimate the probable value of plaintiff's 10% interest in the net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of \$150,000.00.

Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, whether the picture would have earned net profits and if so, you must also

decide how much plaintiff's 10% interest in such net profits would probably amount to.

Requested by Plaintiff and

.....

Judge. [88]

Overton v. Vita-Food Corp.,

94 Cal. App. 2d 367, 210 P. 2d 757;

Jones v. Maria,

48 Col. App. 171. [89]

Plaintiff's Instruction No. 6

(2nd Alternate)

(This instruction is requested only if plaintiff's instruction No. 6 is refused. If plaintiff's instruction No. 6 (Alternate is also given), this instruction is requested with the addition of the portions enclosed in parentheses.)

If you find that plaintiff is entitled to a verdict, then I instruct you that the first sentence of paragraph 29 of the contract is applicable and that your verdict for plaintiff must be in the amount of the "minimum compensation" (unless you find that defendant has waived its right to rely on the first sentence of paragraph 29, in accordance with my previous instruction to you).

I have considered this phrase and have determined that it is ambiguous and, accordingly, it is up to you to decide from all of the evidence you have heard what these words mean with reference to the provisions of the contract and particularly

whether they mean \$50,000.00, the compensation payable one week after commencement of principal photography, as contended by defendant, or whether they mean the entire flat compensation of \$150,000.00, but exclusive of the percentage compensation, as contended by plaintiff. In reaching your decision as to the meaning of the phrase "minimum compensation," you must consider the evidence presented as to the usage in the motion picture industry, the testimony as to the circumstances surrounding the execution of the contract, and in view of the evidence that the defendant undertook the employment contract with plaintiff as part of a settlement of litigation with Polan Banks and a corporation controlled by him, you must also consider the language as it was understood by plaintiff and Polan Banks, as originally negotiated.

Requested by Plaintiff and

.....,

Judge.

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., [90]

178 F. 2d 541, (C.C.A. 9th, 1949) ;

Ross v. Pacific Mortgage Guaranty Co.,

16 Cal. App. 2d 672, 61 P. 2d 368, (1936).

Receipt of Copy acknowledged.

[Endorsed]: Filed January 30, 1951. [91]

[Title of District Court and Cause.]

JURY INSTRUCTIONS REQUESTED BY
DEFENDANT

The defendant in the above-entitled action hereby respectfully requests that the court give the following instructions to the jury: [97]

Instruction No. 1

Requested by Defendant, RKO Radio Pictures, Inc.

The plaintiff, Ann Sheridan, is a motion picture actress, and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. On April 29, 1949, the plaintiff and defendant entered into the contract which has been received in evidence under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled "Carriage Entrance" and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved:

(a) The final shooting script of the screen play for "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for "Carriage

Entrance" or the director who would direct the picture. This action arises from the failure of plaintiff, prior to the termination of her employment by defendant, to approve an actor to portray the leading male role.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 1-25-51 5c. [98]

Instruction No. 2

Requested by Defendant, RKO Radio Pictures, Inc.

On the same day that the contract was entered into, plaintiff in writing approved Robert Young to portray the leading male role in the picture. This writing provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defendant submitted the screen play for "Carriage Entrance" to Robert Young and Young refused to approve such screen

play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that the approval by plaintiff of Robert Young did not obligate her to render her services in the picture and made it necessary that defendant should propose to plaintiff some other person to play such role, and that plaintiff should approve such person before she became bound to render her services.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1/25/51 5c. [99]

Instruction No. 3

Requested by Defendant, RKO Radio Pictures, Inc.

In every contract there is an implied covenant of good faith, and in the contract between the plaintiff and defendant this implied covenant required that defendant should in good faith propose to plaintiff for the leading role in the picture, the names of actors who were competent and qualified to portray such role, and with the intent on the part of defendant to assign to the role any one of such actors who was approved by plaintiff and on the part of plaintiff, the implied covenant was that in refusing to approve any person that defendant

proposed plaintiff would not act arbitrarily or capriciously, but would base such refusal upon some reasonable and sensible objection.

Universal v. California Press,

20 Cal. (2d) 751;

Nelson v. Abrahams,

29 C. (2d) 745.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK :er 1/25/51 5 c. [100]

Instruction No. 4

Requested by Defendant, RKO Radio Pictures, Inc.

The plaintiff had no right or voice in the selection of an actor to portray the leading male role in the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent and qualified actor of recognized standing and reputation in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the plaintiff by her statements or conduct plainly

indicated that she would not approve such actor if he were assigned to the role.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 5 c. 1-24-51. [101]

Instruction No. 5

Requested by Defendant, RKO Radio Pictures, Inc.

The contract between the plaintiff and the defendant provides that if because the plaintiff does not approve an actor to portray the leading male role in the picture the plaintiff does not become obligated to and does not render any services pursuant to the contract, the defendant shall not be required to pay any compensation to the plaintiff. Therefore, if the defendant did in good faith propose any actor to portray such role and plaintiff did not approve such action, defendant was entitled to terminate the contract of employment without paying any compensation to plaintiff.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 1-25-51 5 c. [102]

Instruction No. 6

Requested by Defendant, RKO Radio Pictures, Inc.

The contract between the plaintiff and the defendant provides that if the plaintiff does not approve an actor to portray the leading male role in the picture, the plaintiff does not become obligated to render any services pursuant to the contract. Therefore, if the defendant did in good faith propose any actor to portray such role and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK :er 1-31-51 5 c. [103]

Instruction No. 7

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that the defendant did in good faith propose any actor to portray the leading male role in the picture and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract. Therefore, any services she might have performed could not

have been pursuant to the contract and the plaintiff is not entitled to be compensated for them.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1-25-51 5 c. [104]

Instruction No. 8

Requested by Defendant, RKO Radio Pictures, Inc.

Defendant was under no obligation to propose more than one actor for the leading male role in the picture if such actor was, in the honest judgment of the defendant, qualified for the performance of such role. Having proposed such an actor, defendant was entitled to insist that plaintiff either approve or disapprove such selection by defendant, and if plaintiff disapproved such proposal, defendant might have terminated the contract of employment of plaintiff without incurring any liability to plaintiff.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1-25-51 5 c. [105]

Instruction No. 9

Requested by Defendant, RKO Radio Pictures, Inc.

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

Given:

.....,

Judge.

Refused:

.....,

Judge. [106]

Instruction No. 10

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that defendant did not breach its contract in terminating the employment of plaintiff,

you should next consider whether plaintiff, acting in good faith, refused to approve the name of any one of the actors proposed by defendant for the leading male role in the picture. Unless you find from a preponderance of the evidence that plaintiff did refuse to approve any one of the actors so proposed, and unless you also find that plaintiff did not act in good faith in such refusal, plaintiff did not breach her contract by such refusal and defendant cannot recover on its counterclaim.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 5 c. 1-25-51. [107]

Instruction No. 11

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that defendant did not breach its contract with plaintiff by terminating such contract as and when it did, and that plaintiff did not breach the contract with defendant by refusing to approve an actor proposed for the leading male role in the picture, neither plaintiff nor defendant can recover in this action and your verdict should be for nothing in favor of either party. If you find that defendant breached its contract by terminating the contract of employment and plaintiff is entitled to recover in this action, your verdict should be in her

favor for the sum of \$50,000. If you find that plaintiff breached her contract, your verdict should be for the defendant on its counterclaim in such amount as will compensate defendant for the loss or damage, if any, suffered by defendant by the refusal of plaintiff to approve an actor for the leading male role in "Carriage Entrance."

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 1-25-51 5 c. [108]

Instruction No. 12

Requested by Defendant, RKO Radio Pictures, Inc.

The burden of proof with respect to the allegations of the complaint is on the plaintiff, and plaintiff in order to recover, must prove by a preponderance of the evidence that defendant did not, in good faith, propose the name of any actor to portray the leading male role in the picture, or that plaintiff, after a fair opportunity, did not refuse her approval of any such actor.

You should consider first, whether the defendant did, in good faith, propose the names of actors for the leading male role in "Carriage Entrance," and second, whether plaintiff did by her statements or conduct plainly indicate that she would not approve

any of said actors if he should be assigned to such role. Unless you should find from a preponderance of the evidence either that defendant did not, in good faith, propose the names of actors to portray such role or that plaintiff did not, after being afforded a reasonable opportunity, indicate that she would refuse to approve of any one of such actors who might be assigned to such role, defendant did not breach its contract with plaintiff by terminating her employment as and when it did, and plaintiff cannot recover in this action.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1/25/51 5 c. [109]

Instruction No. 13

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that the defendant did not breach its contract with the plaintiff by terminating such contract when and as it did, and that plaintiff did breach her contract with defendant by refusing to approve an actor for the leading male role in the picture, and that the defendant is entitled to recover on its cross-complaint, then you must determine the amount in which the defendant was damaged.

The measure of defendant's damage is that sum expended by the defendant in good faith with the

expectation that the plaintiff would perform pursuant to the contract after approving an actor to portray the leading male role, and which by plaintiff's failure to approve and to perform were lost to the defendant.

[Endorsed]: Filed January 31, 1951. [110]

[Title of District Court and Cause.]

AFFIDAVIT OF VITO ROTUNNO

State of California,
County of Los Angeles—ss.

Vito Rotunno, being first duly sworn, deposes and says: I am a partner in the firm of Hartman, Rotunno and Myers, investigators and adjusters. We also are in the business of acting as an attorney service in making title reports, investigations of accidents and for service of process. On January 24, 1951, the firm of Gang, Kopp & Tyre retained us for the purpose of serving a subpoena directed to Howard Hughes, issued by the United States District Court for the Southern District of California, Central Division, in the case of Ann Sheridan v. RKO Radio Pictures, Inc., No. 10585-C. Said subpoena directed Howard Hughes to appear as a witness in the courtroom of the Honorable James M. Carter, United States District Judge, on [111] Tuesday, January 30, 1951, at 10:00 a.m.

We were unable to serve Mr. Hughes with said subpoena although we assigned several people to

the job. On January 30, 1951, my partner, Ben M. Hartman, sent to Mr. Rudin of Gang, Kopp & Tyre a statement of our actions in attempting to serve Howard Hughes. Said statement is attached hereto as Exhibit "A." I am familiar with the statements made in said Exhibit "A" and incorporate all of said statements contained therein in this affidavit as though fully set forth herein.

/s/ VITO ROTUNNO.

Subscribed and sworn to before me this 1st day of February, 1951.

EDMUND L. SMITH,
Clerk, U. S. District Court.

By /s/ WM. A. WHITE,
Deputy. [112]

To: Milton R. Rudin, Esq.,
Messrs. Gang, Kopp & Tyre,
Attorneys at Law,
1680 North Vine Street,
Hollywood 28, California.

Subject: Howard Hughes,
Beverly Hills Hotel,
Beverly Hills, California.

Re: Attempted Service of Howard Hughes. [113]

Representatives of the office of Hartman, Rotunno and Myers attempted to serve a subpoena issued by the United States District Court for the Southern District of California, Central Division, in the case

of Ann Sheridan vs., RKO Radio Pictures, Inc., Civil Action File No. 10585-C. The following is a report of events in the attempted service.

January 24, 1951

At or about 2:00 p.m., representative B. G. Potter of Hartman, Rotunno and Myers, proceeded to the Beverly Hills Hotel and went to Apartments 20 and 21 and found out that Howard Hughes is living in Apartments 19 and 19-A. Representative checked Apartments 19 and 19-A and the venetian blinds were wide open, lights were on in the apartment. Representative rang the door buzzer but no one answered. Representative remained in the area until approximately 5:30 p.m.

At 6:15 p.m., representative B. G. Potter returned to the Beverly Hills Hotel and checked Subject's apartments. Venetian blinds were drawn, lights still on. Representative could hear someone speaking on a telephone. At that time there were several other telephones in the apartment ringing continuously, so representative waited until the person got off the telephone. After waiting for approximately 15 minutes, representative rang the door buzzer but no one answered, and the person on the telephone kept on talking. Representative noticed a side window of the apartment open so called in but received no answer. Approximately twenty minutes later the phones were quiet and the man had finished talking. Representative then called out, "Mr. Hughes." and then said, "Howard." Instead of receiving a response, however, the two side windows were slammed shut. Representative then went

around to the side of the apartment and as he started up the alley a voice called out from a rear window, "Vern?" [114] Representative answered, "No, Bill." The voice then said, "Just wait a minute." Representative waited, then about thirty seconds later a man came up beside the apartment house and asked if he could help. Representative said he would like to see Mr. Hughes and the man replied that representative would have to call his office and make an appointment. Representative then got into his car and drove away. Off at 7:00 p.m.

From 8:20 p.m. to 11:00 p.m., representatives Potter and Ben M. Hartman kept the Beverly Hills Hotel under surveillance with no activity or sign of the subject.

January 25, 1951

2:00 p.m. to 7:00 p.m. Representative Ben M. Hartman kept the Samuel Goldwyn Studio under observation in attempt to serve Subject.

7:30 a.m. to 9:00 a.m. Representative Potter checked the Beverly Hills Hotel area with negative results.

3:00 p.m. to 6:00 p.m. Representative Potter returned to the Beverly Hills Hotel and kept the area under observation. Also contacted the Beverly Hills Police Department and was informed that Howard Hughes drives three vehicles which are registered to the Howard Hughes Tool Company. One is a dark blue '46 Buick and the other two are black Chevrolets. It was also learned that subject often goes up into the hills around Beverly Hills and

transacts business with various business associates in his car.

7:30 p.m. to 1:00 a.m., Representative Potter checked the San Ysidro area and the vehicles in the area but none of those in the vicinity were registered to the subject. Remained in the vicinity of the hotel until 1:00 a.m. [115]

January 26, 1951

8:00 a.m., to 9:30 a.m. Representative Potter checked the Beverly Hills Hotel and noticed a man walking down the alley to Howard Hughes' apartment. This individual then stood by the subject's apartment. Representative parked his car and walked across a field and watched for a while but nothing happened.

7:30 p.m. to 1:00 a.m. Representatives Kay Lang and Potter went to the Beverly Hills Hotel and checked the subject's apartment. The lights were on in the apartment but no one answered the door.

3:00 p.m. to 6:00 p.m. Representative Kenneth Marapese surveilled the Howard Hughes plant but subject made no appearance.

January 27, 1951

11:00 a.m. to 5:30 p.m. Representative Vito Rotunno proceeded to San Pedro and checked the yacht clubs with negative results. Various yacht clubs in Wilmington were also check with negative results.

The channel where the "Flying Boat" is located was also checked with negative results.

7:00 p.m. to 3:00 a.m. Representatives Alice Moore and Potter checked the Beverly Hills Hotel

and also went to the various eating and drinking establishments on Sunset Strip where the subject is known to frequent with negative results.

January 28, 1951

9:00 a.m. to 11:30 a.m. Representative Kenneth Marapese checked the Beverly Hills Hotel with negative results.

2:00 p.m. to 4:00 p.m. Checked the Players on Sunset Boulevard with negative results. [116]

January 29, 1951

11:30 a.m. to 12:30 p.m. Checked the Players and the Hotel in attempt to serve Subject.

In addition to the above attempts to serve the subject, this office made various telephone calls to the Beverly Hills Hotel and the Studio and the Howard Hughes Plant in attempt to locate the subject but received the stock answer that subject was out of town. A spot patrol was also kept on the Howard Hughes Plant in Culver City with negative results as no one was seen in the area answering Subject's description.

Very truly yours,

HARTMAN, ROTUNNO &
MYERS,

By /s/ BEN M. HARTMAN,
A Partner.

bmh/kf

[Endorsed]: Filed February 1, 1951. [117]

RETURN ON NON-SERVICE OF WRIT

United States of America,
Southern District of California—ss.

I hereby certify and return that I received the annexed Subp. on Jan. 9th, 1951, and returned same not served as to Howard Hughes on Jan. 30, 1951. Reason: Unable to located within Southern District of California.

JAMES J. BOYLE,
United States Marshal.

By /s/ JAMES H. BLANCO,
Deputy.

[Endorsed]: Filed February 1, 1951. [119]

In the United States District Court, Southern
District of California, Central Division

No. 10585—C Civil

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Cor-
poration,

Defendant.

VERDICT ON THE COMPLAINT

We, the Jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., a Dela-

ware corporation, on the complaint herein, and assess the damages against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00), principal, together with interest in the sum of Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$5,162.42), making a total sum of Fifty-Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$55,162.42).

Dated: Los Angeles, Calif., Feb. 6th, 1951.

/s/ THEODORE C. HINCKLEY,
Foreman of the Jury.

[Endorsed]: Filed February 6, 1951. [141]

In the District Court of the United States, Southern
District of California, Central Division

No. 10585—C Civil

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Corporation,

Defendant.

JUDGMENT

The above-entitled action having been duly tried before the Honorable James M. Carter, United States District Judge and a jury, at a trial commencing on the 30th day of January, 1951, and continuing thereafter to the 6th day of February,

1951; the plaintiff having appeared by Gang, Kopp & Tyre, by Martin Gang and Milton A. Rudin, her attorneys; the defendant having appeared by Mitchell, Silberberg & Knupp, by Guy Knupp and Gordon Jeffers, Jr., its attorneys; both sides having been heard, and the jury having duly rendered a verdict on plaintiff's complaint in favor of the plaintiff and against the defendant in the sum of \$50,000.00 principal, together with interest in the sum of \$5,162.42, making a total sum of \$55,162.42, and the costs of the plaintiff having been duly taxed in the sum of \$968.42; [142]

The court having instructed the jury that if the jury entered a verdict on the complaint in favor of plaintiff and against defendant that the jury could not find in favor of defendant and against plaintiff on defendant's counterclaim, and the jury having rendered a verdict, as aforesaid, on the complaint in favor of plaintiff and against defendant,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that judgment be and it is hereby entered on defendant's counterclaim in favor of plaintiff and against defendant, and it is further ordered that defendant take nothing by its counterclaim;

It is Further Ordered, Adjudged and Decreed that plaintiff, Ann Sheridan, do recover of the defendant, RKO Radio Pictures, Inc., a Delaware Corporation, the sum of \$55,162.42, together with the sum of \$968.42 costs as taxed, and that the plaintiff have execution therefor.

The Clerk is directed to enter this judgment.

Dated: February 10, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge.

Approved as to form pursuant to local rule 7.

MITCHELL, SILBERBERG &
KNUPP,

By /s/ GUY KNUPP,
Attorneys for Defendant.

Judgment entered February 9, 1951.

[Endorsed]: Filed February 9, 1951. [143]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant RKO Radio Pictures, Inc., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in said action on February 9, 1951.

Dated: March 5th, 1951.

MITCHELL, SILBERBERG &
KNUPP and

GUY KNUPP,

By /s/ GUY KNUPP,
Attorneys for Appellant RKO
Radio Pictures, Inc.

[Endorsed]: Filed March 6, 1951. [144]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS UNDER
RULE 73

Notice is hereby given that Ann Sheridan, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on February 9, 1951, in Judgment Book No. 70, Page 717, records of the above-entitled court which allowed damages to plaintiff in the limited sum of \$50,000.00, plus interest thereon, and failed to award damages to plaintiff in a sum in excess of \$50,000.00, plus interest thereon.

Dated: March 7th, 1951.

GANG, KOPP & TYRE,

MARTIN GANG and
MILTON A. RUDIN,

By /s/ MARTIN GANG,

Attorneys for Plaintiff and
Appellant, Ann Sheridan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1951. [145]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

Defendant, RKO Radio Pictures, Inc., having filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in said action on February 9, 1951, and the plaintiff, Ann Sheridan, having filed her notice of appeal to said Court of Appeals from that part of said final judgment designated in her notice of appeal and having, with said notice of appeal, served and filed a statement of the points on which she expects to rely on appeal and a designation of the portions of the record to be contained in the record on appeal; and

The parties having agreed to designate, by written stipulation filed with the Clerk of the District Court the parts of the record proceedings and evidence to be included in the record on appeal in lieu of any designation by either party or any counter designation by the other party; [147]

Now, Therefore, pursuant to Rule 73(f) of the Rules of Civil Procedure, it is hereby stipulated and agreed that the record on appeal shall consist of the following:

1. Amended complaint for damages for breach of contract.
2. Motion to dismiss the second count or cause of action set forth in said amended complaint.

3. Minute order granting said motion to dismiss.
4. Answer and counterclaim.
5. Answer to counterclaim.
6. Order for pre-trial hearing on December 4, 1950.
7. Memorandum for counsel by Honorable District Judge, filed December 13, 1950.
8. Memorandum for counsel on pre-trial order by the Honorable District Judge, filed January 18, 1951.
9. Pre-trial stipulation and order of the court dated January 30, 1951.
10. The reporter's transcript of all of the evidence and proceedings at the trial, including all objections to instructions to the jury given or refused by the court and the ruling of the court on such objections.
11. All exhibits offered by either party.
12. Instructions to the jury given by the Honorable District Judge.
13. Instructions to the jury requested by the plaintiff.
14. Instructions to the jury requested by the defendant.
15. Affidavit of Vita Rotunno filed by plaintiff in connection with the motion of plaintiff for an

order of court requiring defendant to produce as a witness Howard R. Hughes, Managing Director production of defendant. [148]

16. Return of service of the United States Marshal concerning the inability of said United States Marshal to serve a subpoena on said Howard R. Hughes.

17. The verdict of the jury.

18. The judgment.

19. The notice of appeal filed by the plaintiff.

20. The notice of appeal filed by the defendant.

21. This stipulation.

It is the intention of the parties by this stipulation to include in the record upon appeal the complete record and all proceedings and evidence in the action and if, when the stenographic report of the evidence and proceedings at the trial is prepared, either party shall upon examination of said stenographic report, desire and request the inclusion in the record upon appeal of any matter not included in such stenographic report, such matter shall be included in said record on appeal.

Dated: March 13, 1951.

GANG, KOPP & TYRE and
MARTIN GANG,

By /s/ MARTIN GANG,

Attorneys for Appellant-
Appellee Ann Sheridan.

MITCHELL, SILBERBERG &
KNUPP and

GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Appellant

RKO Radio Pictures, Inc.

It Is So Ordered. Dated: March 15, 1951.

/s/ JAMES M. CARTER,
Judge.

[Endorsed]: Filed March 15, 1951. [149]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND DOCK-
ETING THE APPEAL

Good cause appearing to the Court, therefore it is hereby ordered that the time for filing the Record on Appeal and docketing the appeal may be and the same is hereby extended to and including the 15th day of May, 1951.

Dated: April 3rd, 1951.

/s/ JAMES M. CARTER,
Judge.

[Endorsed]: Filed April 3, 1951. [150]

In the United States District Court, Southern
District of California, Central Division

No. 10585-C Civil

Honorable James M. Carter, Judge Presiding.

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Cor-
poration,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, January 30, 1951

Appearances:

For the Plaintiff:

GANG, KOPP & TYRE, by
MARTIN GANG, ESQ., and
MILTON RUDIN, ESQ.,
401 Taft Building,
Los Angeles, California.

For the Defendant:

MITCHELL, SILBERBERG &
KNUPP, by
GUY KNUPP, ESQ., and
GORDON JEFFERS, ESQ.,
604 Roosevelt Building,
Los Angeles, California.

The Court: Call the calendar.

The Clerk: No. 10585-C Civil, Ann Sheridan v. RKO Radio Pictures, for jury trial.

Mr. Gang: Ready for plaintiff.

Mr. Knupp: Ready for defendant. [2*]

* * *

The Court: Mr. Clerk, call the jury.

The Clerk: As I call the names, the jurors will take their places in the jury box.

(Whereupon a jury was duly empaneled and sworn.)

The Court: We are advised that the remaining jurors will not be needed today and may be excused until further order from the clerk of this court. You are not required to remain any longer in attendance, although you may do so if you desire. You do not have to leave.

Mr. Gang, do you want to make an opening statement about [5] this case?

Mr. Gang: With your permission, your Honor.

The Court: You may. [6]

* * *

(Thereupon counsel for the respective parties made opening statements to the jury and upon the conclusion thereof the following proceedings were had.)

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

ANN SHERIDAN

the plaintiff herein, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ann Sheridan.

Direct Examination

By Mr. Gang:

Q. Where do you live, Miss Sheridan?

A. 5263 Balboa Boulevard, Encino.

Q. And you have lived in California how long?

A. Since 1933.

Q. What was the picture in which you were rendering your services at or about the spring of 1949?

A. "I Was a Male War Bride" for Twentieth Century-Fox.

Q. Did you in 1948 have discussions with Mr. Polan Banks with reference to your services as an actress in a motion picture based on his novel, "Carriage Entrance"? A. Yes, sir, I did.

Q. Those conversations and discussions continued from 1948 into the spring of 1949 while you were in this country? A. That's right.

Q. Do you remember the date April 29, 1949?

A. Yes, that is the date I signed the contract at RKO. [28]

Mr. Gang: If the court please, may I offer the contract in evidence as Plaintiff's Exhibit 1 and ask that the handwriting on it be disregarded.

(Testimony of Ann Sheridan.)

There is some handwriting marked "Approved" in pencil. I don't know when it was put on there, but I do not offer the handwriting but merely the typewritten portion and the signatures.

Mr. Knupp: May I see it a moment, please?

(Document handed to counsel.)

Mr. Gang: Is it your Honor's custom for the attorney to hand the document to the clerk?

The Court: We don't stand on formality around here. Just conduct yourself like you ordinarily do in any court room, Mr. Gang.

Mr. Knupp: There are some other pencil marks on the document. I understand that there is nothing offered except the printed document.

Mr. Gang: If you have a copy with nothing printed on it, I will take that.

Mr. Knupp: That is perfectly satisfactory, Mr. Gang.

The Court: It will be received as Plaintiff's No. 1 in evidence.

(The document referred to was marked Plaintiff's Exhibit 1, and was received in evidence.)

The Court: Ladies and gentlemen of the jury, the parties through their attorneys have stipulated to most of [29] the documentary evidence in this case, so we will be able to eliminate a lot of evidence that is ordinarily devoted to foundation. The documents have been exhibited and we know

(Testimony of Ann Sheridan.)

which ones are going into evidence. We will save some time in that respect. However, there is not in evidence the pencil notations on the document. You may disregard them entirely.

Q. (By Mr. Gang): I have not shown it to you, Miss Sheridan, but the document in question has been stipulated to as the document which you did sign. Did you sign it on the date it bears, April 29, 1949? A. That's correct.

Q. Where were you when you signed that?

A. I believe at the home of my secretary.

Q. At the same time did you sign a letter which was brought to you with the contract?

A. Yes, sir.

Q. Also dated April 29, 1949?

A. That's correct.

Mr. Gang: We will offer that, your Honor, as Plaintiff's Exhibit 2, again disregarding a pencil line drawn on it.

The Court: It will be received as Plaintiff's Exhibit 2, disregarding the pencil notation on it.

(The document referred to was marked Plaintiff's Exhibit 2, and was received in evidence.) [30]

The Court: From time to time these will be shown to you or read to you, so you will get to see them as we progress.

Mr. Gang: With the usual facility for reading my mind, you took the words out of my mouth. I was wondering whether your Honor wanted to

(Testimony of Ann Sheridan.)

read that to the jury or whether I should, now that it is in evidence.

The Court: I am not a very good reader. You had better read it.

Mr. Gang: My effort to read it won't indicate that I think I am. With the court's permission I will read to you from Plaintiff's Exhibit 1, which is the contract which we may refer to as the contract, just the portion which has to do with these approvals, and I will read this letter which has been introduced as Plaintiff's Exhibit 2, so that you may have this part of the picture clearly in mind. From the contract I will read only paragraph 1.

“Producer”—and that word means RKO—
“hereby employs Artist”—which means Miss Sheridan—“as an actress, performer and entertainer to portray the leading female role in the photoplay now entitled ‘Carriage Entrance’ to be produced by Producer. Said photoplay may hereinafter be referred to as ‘Carriage Entrance,’ or as the ‘Picture,’ or as the ‘photoplay.’ Artist shall [31] not, however be required to render any services pursuant hereto unless and until she has approved each and all of the following:

“(a) The final shooting script of the screen play for ‘Carriage Entrance’;

“(b) The director who will direct ‘Carriage Entrance’; and

(Testimony of Ann Sheridan.)

“(c) The actor who will portray the leading male role in ‘Carriage Entrance.’

“With respect to item (a) above the Artist has heretofore approved the first draft estimating script entitled ‘Carriage Entrance’ by Leopold Atlas, consisting of a one (1) page note, one hundred forty-eight (148) pages of screen play and five (5) pages of synopsis covering the unfinished ending, all of which material is hereinafter referred to as the ‘Estimating Script,’ subject to such Estimating Script being completed and ‘polished.’ The Artist agrees that she shall not have the right to disapprove of the final shooting script if it is a reasonable completion and development of the Estimating Script or does not depart from the novel ‘Carriage Entrance’ [32] and the Estimating Script so as to substantially alter and diminish the importance of the Artist’s role as written in the novel ‘Carriage Entrance’ and in the Estimating Script.”

And the letter, which is short——

Mr. Knupp: Let me ask you, Mr. Gang. Were you reading from the contract?

Mr. Gang: Yes, paragraph 1 of the contract in its entirety.

Mr. Knupp: Is that all you expect to read from the contract?

Mr. Gang: At this time.

A letter which was signed by plaintiff at the

(Testimony of Ann Sheridan.)

same time, which is Plaintiff's Exhibit 2. It is addressed to RKO and reads:

"Gentlemen:

"Please refer to the agreement between us dated April 29, 1949, relating to my employment by you in connection with your motion picture now entitled 'Carriage Entrance,' which agreement is being entered into concurrently herewith.

"This will confirm that I have approved and hereby approve any of the following individuals to act as the director of 'Carriage Entrance': [33]

"John Cromwell,

"Robert Stevenson,

"H. C. Potter.

"You shall not be obligated to assign any of these individuals to direct the Picture, but any other individuals proposed by you to direct the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

"This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in 'Carriage Entrance.' You shall not be obligated to assign him to portray the leading male role in the Picture, but any other individual proposed by you to portray the leading male role in the Picture shall

(Testimony of Ann Sheridan.)

be subject to my approval, as set forth in Article 1 of said employment agreement.

“Dated April 29, 1949.

“Yours very truly,

“Ann Sheridan.”

Q. (By Mr. Gang): After signing Plaintiff's Exhibits 1 and 2, Miss Sheridan, when was the first occasion on which you thereafter went to the studios of RKO? [34]

A. My first visit to the lot after that was on June 16th, a luncheon given by Mr. Rogell, sort of a welcome luncheon to, as they say, roll out the red carpet for you and welcome you on the lot for your first picture.

Q. Can you tell us who was present at that luncheon?

A. There was Mr. Rogell, Mr. Sparks, the producer; Mr. Banks, the associate producer; Mr. Perry Lieber, head of the publicity; Mr. Hickox, my business manager, and myself.

Q. Thereafter when was the next occasion on which you came to the studio?

A. The next occasion was early in July, I would say somewhere between the 5th through the 7th. A telephone call from Mr. Banks asking me to come to the studio to discuss the script and necessary changes in it.

Q. May I at this point ask you if between April 29, 1949, and July 5, 1949, there had been any work done on the script for the picture?

(Testimony of Ann Sheridan.)

A. Yes, sir. I was informed by Mr. Banks that RKO had assigned a writer to the script, to the Atlas script, by the name of Parsonnet, and that he was rewriting the script for RKO.

Q. Before your trip to the studio early in July had you received a copy of the revised script?

A. Yes, I had received a copy of it just a couple of days before. [35]

Q. And had you read it?

A. I had read it and made notes, yes.

Q. After this call from Mr. Banks you went to the studio, you say? A. That is correct.

Q. To whose office did you go?

A. Mr. Sparks' office.

Q. Who was there on that occasion?

A. Mr. Parsonnet, Mr. Sparks, Mr. Banks, Mr. Hickox, and myself.

Q. Did you at that time have a discussion with reference to the revised script?

A. Yes, there was a discussion.

Q. Can you repeat—and may I say at this time that I don't know whether you have ever been a witness in court, perhaps you have in pictures—have you ever been a witness in court?

A. No, sir.

Q. If I may say so, nobody expects any witness to remember exactly what anybody said a year ago, so I will ask you not to try to get the exact words, but give us the substance of what was said, and if

(Testimony of Ann Sheridan.)

possible who said what. You needn't try for the exact words.

A. All right. Thank you.

Well, after Mr. Hickox and I were introduced to Mr. [36] Parsonnet, Mr. Banks asked me what I felt about the rewritten script, how I liked it. I told him that as far as my part was concerned it needed very little work to polish it and bring it up to what I expected of it, or to my liking but that I was afraid that in rewriting the part of Paul so that Melvyn Douglas would be pleased with it, that Mr. Parsonnet had minimized Mr. Young's part, the part of Martin Lucas—is that correct now?—to the extent that Mr. Young would be forced to refuse to do it. Mr. Sparks spoke up and said, "You are right, Annie, Bob has refused to do the part."

It came as a slight shock, I must admit, and there was a general discussion on his having refused the part. Mr. Sparks said that he knew that they could force Mr. Young to do the part if they were so inclined, because Mr. Young had only story approval, not script approval, but they didn't feel like doing that.

He suggested that I call Mr. Young, who was at that time on a ranch somewhere up north, and see if I could persuade him to accept the part. I told him that I didn't think I should at that particular time because I didn't think it was fair to try to persuade anyone to do a part they didn't like, or to coerce them into doing it. Perhaps we

(Testimony of Ann Sheridan.)

should wait until the part had been rewritten and built up, as Mr. Parsonnet told me that they were going to try to do, then perhaps I would have something to sell Mr. Young on. [37]

At that time Mr. Sparks asked me if I thought of any possible replacement for Mr. Young, and I said, no, I hadn't, and he handed me a casting directory and asked me to go through it for a possible replacement. I did turn through the casting directory and there were general discussions on numerous people in it, but I felt that it was much too serious a problem for the right type of person to judge too quickly, and I asked for a little more time in which to go through that directory and to see who was available before I would suggest anyone.

Mr. Knupp: Miss Sheridan, I will try not to interrupt you, but I would ask that when you are relating these conversations—you said that you felt, and I think your testimony really should be confined to what was said at the conversations. The expression of your opinions or your views, unless they were the subject of the conversation, are really not admissible.

Do you agree, Mr. Gang?

Mr. Gang: I agree with Mr. Knupp, and I should have perhaps instructed you a little more completely on the functions of a witness. You are not supposed to say what you did say, that you felt a shock. That is subjective, and unless you fell on the floor so that everybody could see it, it

(Testimony of Ann Sheridan.)

wouldn't be anything that the court would let the jury speculate on. So Mr. Knupp is entirely [38] right.

The Witness: I see.

Q. (By Mr. Gang): If you will try to relate only what was said and done. In other words, acts which are external and objective as distinguished from what you felt internally and didn't say. If you said, "I am shocked," that would be something you said; if you just felt it, you cannot say it.

Is that a fair statement, Mr. Knupp?

Mr. Knupp: That is a very fair statement, Mr. Gang. I think we are agreed on that.

The Court: Are you moving to strike, Mr. Knupp?

Mr. Gang: I will stipulate, if your Honor please, that may go out where she said, "I felt a shock."

The Court: That portion referred to by Mr. Gang may be stricken from the record, and the jury will be instructed to disregard it.

The Witness: I am sorry.

The Court: It is a very common happening, Miss Sheridan. Don't let it bother you.

Q. (By Mr. Gang): You had not finished all of that meeting yet, had you, Miss Sheridan?

A. Yes, I had. I asked for more time in which to go through the casting directory and try to select someone, the proper type for the part.

Q. For the edification of both the jury and the court, and [39] counsel, perhaps, can you describe

(Testimony of Ann Sheridan.)

what the casting directory is, how big a book it is and what is in it?

A. It is quite a big book, quite a thick book. May I use gestures with that? I would say it is about that thick (indicating).

Q. About four inches thick?

A. About three or four inches thick, and it contains pictures of all different types of actors, comedians, leading men, character men and character women, leading women, all that is in it, and it is merely a book that people can refer to to refresh their memories to see who was in the business and who might be available.

Q. When you left there did you borrow the casting directory?

A. Yes, sir, I did, as a matter of fact.

Q. You took it home with you?

A. Yes, sir.

Q. You placed this meeting sometime after the 5th of July and before the 8th of July, is that correct? A. Yes, sir.

Q. And after that how many days elapsed before you again went to RKO?

A. Well, it would have been sometime between the 8th and the 11th, as I recall it.

Q. Through whom did you get the message to come to the [40] studio on this occasion?

A. Mr. Banks, again.

Q. You again went to Mr. Sparks' office?

A. Yes, sir, he asked us to come to the studio,

(Testimony of Ann Sheridan.)

said that Mr. Sparks wished to run some film for us on possible replacements for Mr. Young.

Q. What time of day was it?

A. What time of day was it?

Q. Yes.

A. About 11:00 o'clock in the morning, I believe.

Q. Did you go to the projection room of the studio or Mr. Sparks' office?

A. We went first to Mr. Sparks' office. He said that Mr. Rogell had asked to be notified of our arrival, that he wished to come down and say a few words to us. Mr. Rogell was notified, he came to the office, said that he had been instructed to run film for us on possible replacements for Mr. Young. Mr. Rogell, Mr. Banks, Mr. Hickox and myself then proceeded to the projection room where Mr. Rogell said he would leave us in the very capable hands of Mr. Banks and Mr. Sparks, and to please notify him of my reaction to these possible replacements.

We then ran film from a picture, "Bed of Roses" it was called at that time—I don't recall, but "Born to Be Bad," I believe it was later released as—and we ran some scenes [41] on Mel Ferrer and Robert Ryan. Both of the men appeared in that picture. Mel Ferrer in the part of an artist was very little in evidence, and Mr. Ryan was one of the, shall we say, love interests of Miss Fontaine in the picture. We ran several scenes, and after the scenes were finished I said that I felt while both

(Testimony of Ann Sheridan.)

men were interesting and very fine actors, I didn't feel that either one of them was the right type for the part of Martin Lucas, or at that time Dr. Quentin, in "Carriage Entrance." Mr. Banks said that he was inclined to agree with me, Mr. Hickox agreed with me, and at that time Mr. Sparks——

Mr. Knupp: Miss Sheridan, I didn't get just the last part of that answer.

The Court: Read it, Mr. Reporter.

(The record was read by the reporter.)

Q. (By Mr. Gang): Continue.

A. (Continuing): Mr. Sparks asked Mr. Hickox and me to go to lunch with him and Mr. Banks. We accepted the invitation and started for the commissary, and en route to the commissary during general conversation Mr. Sparks volunteered the information that he felt that I was right about neither one of the gentlemen in the film being right for the part of Martin—what is the name again?

Q. Martin Lucas. [42]

A. Do you mind if I call him Dr. Quentin after this? I am more familiar with that.

Q. We will know you mean Martin Lucas.

A. (Continuing): ——of Dr. Quentin, but that he felt if either one of them would be used in the picture or could be used in the picture Mr. Ferrer would be far better as the part of Paul Boravel who played my cousin, who was my cousin in the picture. We continued to the commissary. Mr. Sparks excused himself for a few minutes and I

(Testimony of Ann Sheridan.)

believe returned to his office. He later returned, we had lunch, a very pleasant luncheon, and that was the end of that meeting.

Q. Your next trip took place how many days later, approximately, Miss Sheridan?

A. I would say anywhere from the 11th to the 14th.

Q. Of July? A. Of July, yes, sir.

Q. And from whom did you receive a call this time? A. Mr. Banks.

Q. Mr. Polan Banks? A. Yes, sir.

Q. And in whose office did the meeting take place?

A. It took place in Mr. Sparks' office.

Q. Who was present at that meeting?

A. Mr. Banks, Mr. Sparks, Mr. Hickox, and myself.

Q. Can you give us the substance of the conversation [43] which ensued?

A. We arrived at the office at the appointed time, and Mr. Sparks again asked me to go through the casting directory to see if I could think of anyone as a possible replacement. And while I was doing so Mr. Sparks said, "How about John Lund?" And I said that I was not familiar with his work. Mr. Hickox said that he had seen him in "Foreign Affair" with Marlene Dietrich, and Jean Arthur, and that he was excellent in that picture. Mr. Banks then suggested that they check Paramount as to his availability, to which I agreed and said that in

(Testimony of Ann Sheridan.)

the meantime I would try to see one of his pictures and let them know how I felt about him.

I was still going through the casting directory, and I suggested the name of Richard Conte. Mr. Sparks said that he felt that would be good casting and suggested that they contact Twentieth Century-Fox and check as to Mr. Conte's availability.

Mr. Hickox was going through a casting directory at the same time, and he said, "How about Kirk Douglas, Dana Andrews, or Glenn Ford in the part?" And Mr. Sparks said all of them would be fine casting, as far as that is concerned, but none of them were available as they were preparing pictures or working in pictures.

Mr. Hickox then said, "How about Robert Mitchum?" and [44] Mr. Sparks said that he would be fine, yes, but he was not available, he had been assigned to "Jet Pilot."

The meeting ended with all of us willing to continue to search for a possible replacement and with their agreeing to check on both Mr. Lund and Mr. Conte as to their availability.

Q. Did you have another meeting with Mr. Sparks a few days after that?

A. Yes, sir. On about between the 14th and the 16th I would say it took place.

Q. The same people present?

A. Yes, sir, the same people present.

Q. Can you give us the gist of that conversation?

A. Well, again there was the casting directory

(Testimony of Ann Sheridan.)

brought out and we were turning, leafing through it, and I asked Mr. Sparks if he had heard anything on Mr. Lund, and he said no, there had been no news from Paramount so far. I asked about Richard Conte, and he said there had been no news on Richard Conte so far.

We continued to look through the casting directory, and all of a sudden Mr. Sparks said, "How about Franchot Tone?" and I said I didn't know, I would have to think it over, maybe he would be interesting in the part.

Mr. Sparks pointed out that Mr. Tone was on the lot, working on the lot, on another picture at the time, cutting [45] another picture, and he suggested—asked me, rather, about calling Mr. Tone in for a little chat, said that he would like to see the two of us together, anyway, and I said that I would like that very much, I hadn't seen Doc Tone in years.

Mr. Sparks then called his secretary and asked her to contact Mr. Tone's office and have them get in touch with him and have him come to Mr. Sparks' office.

The Court: Did you call him Doc Tone?

The Witness: Yes.

The Court: Was that his nickname?

The Witness: That was a nickname.

The Court: All right.

The Witness: The secretary complied with Mr. Sparks' request, and he reported that Mr. Tone

(Testimony of Ann Sheridan.)

was out on the lot but they would contact him and see that he dropped by Mr. Sparks' office.

There was more general conversation and in about 15 minutes Mr. Tone came into the office. After the usual greetings and an introduction to Mr. Hickox, whom he did not know, he and I talked about our respective trips to Europe for about 20 minutes, and Mr. Tone left.

Mr. Sparks said to me, "What do you think about him?" and I said, "Why, I think he would be very interesting in the part. I think he will do." [46]

There was more general conversation in which we all joined, and finally I said, "You can tell them,"—meaning the front office—"that I definitely approve Doc Tone."

Mr. Sparks then said that it looked like our worries were over and that we could start with the picture right away, because he had already approached Mr. Tone on the subject of doing the part in the picture and Mr. Tone was anxious to do it, and that all he had to do now was to get the O.K. of the front office. And the meeting terminated on that note.

Mr. Gang: This is a good note to terminate on before lunch, your Honor.

The Court: Yes, and the right time, also.

We will take our adjournment for lunch. Ladies and gentlemen of the jury, the court admonishes you of your duty not to converse or otherwise communicate among yourselves, or with anyone else

(Testimony of Ann Sheridan.)

concerning the merits of this cause and not to form or express any opinion on the case until it is finally submitted to you for your verdict. You may be excused at this time until 2:00 o'clock. Court will remain in session.

(Whereupon the jury left the court room and the following proceedings were had in the absence of the jury:)

The Court: You may step down, Miss Sheridan.

Mr. Gang: When we come back at 2:00, your Honor, shall we then get the formality over with reference to the offer of [47] proof?

The Court: Yes, that is as good a time as any. You mean let the jury stay upstairs a while?

Mr. Gang: Yes, for a few minutes after we get back.

The Court: Yes.

(Whereupon, at 12:05 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [48]

January 30, 1951—2:00 P.M.

(The following proceedings were had in the absence of the jury:)

The Court: Is it stipulated that the jury is absent from the court room?

Mr. Knupp: Are all the jurors absent, if the court please? I am not sure if these people back here are jurors.

Mr. Gang: I hope they are all absent.

Mr. Knupp: I wasn't sure.

Mr. Gang: I am not acquainted enough with them to know.

The Court: Are the jurors upstairs, Mr. Bailiff?

The Bailiff: Yes.

The Court: All right.

Mr. Gang: If the court please, I assume that your Honor's rulings on the law as set forth in our pre-trial hearings and in the pre-trial stipulation and order of court signed this morning still stand, and I therefore ask the indulgence of court and counsel. May it be stipulated, Mr. Knupp, that there is a witness on the stand and that I have addressed to that witness questions concerning the meaning of the phrase "minimum compensation" in the contract, and questions with reference to the damages for which plaintiff contends, that you have objected to such questions on the grounds raised in the pre-trial hearings, and on which the [49] court has ruled; that the court has sustained your objections and that plaintiff at this time is making an offer of proof so that the court may in the record be acquainted with the nature of the evidence which plaintiff would have presented if the court had not made its rulings, in other words, that all the formalities with reference to the offer of proof have been observed?

Mr. Knupp: That is stipulated. I understand that objection, generally, to be that the evidence with respect to which you expect to make an offer of proof is incompetent and immaterial.

The Court: The stipulation should probably go

further. You said, "a witness on the stand." A witness duly sworn. I take it it is not necessary to name the witness, is it, Mr. Knupp?

Mr. Knupp: I don't think so, if the court please.

The Court: For the purpose of this proceeding, I take it, is to preserve for Mr. Gang and the plaintiff his record in the event the court is wrong in the ruling that I have made. That is the purpose of this proceeding.

Mr. Gang: The only purpose, your Honor.

Mr. Knupp: I understand that if there should, unfortunately, be resort to a higher court, that the purpose of this evidence would be to lay a foundation upon which the question of the correctness of the rulings of the court [50] relative to the construction of the contract could be passed upon by the higher court, so that if evidence of this character was material or relevant and the matter was sent back for a further trial, Mr. Gang would still have an opportunity to present evidence to the effect which he now proposes to offer.

Mr. Gang: Thank you. We also have the question of damages.

The Court: You are taking up now the interpretation of the contract?

Mr. Gang: Yes, the first one is with reference to the interpretation of the contract.

The Court: And Mr. Knupp's objection is based upon the ground that the term "minimum compensation," the meaning of that term, can be ascertained from the four corners of the contract,

while it is your contention that the contract is ambiguous and that, therefore, outside evidence and without the contract would be admissible.

Mr. Gang: We also contend that it means \$150,000. But I imagine the real offer of proof is concerned with the fact that parol evidence should have been admitted for the purpose of showing what the phrase did mean.

The Court: The objection is sustained. You may proceed with your offer of proof.

Mr. Gang: Thank you. [51]

We would offer to prove that in August of 1948 the plaintiff discussed with Mr. Polan Banks the production of a motion picture by a corporation controlled by Mr. Banks, in which the plaintiff would portray the leading female role. At that time and under date of August 18, 1948, Mr. Loyd Wright, acting as the attorney for the plaintiff, addressed a letter to Mr. Polan Banks, which for the purpose hereof I term a letter of intention, which in effect set forth that in the proposed and possible contract which was to be negotiated Miss Sheridan would receive as compensation for her services the sum of \$150,000 and a percentage of the producer's net profits, \$50,000 cash payable on the first day of shooting the picture and \$100,000 deferred, the \$100,000 deferred to be paid from producer's gross receipts as a part of production costs and shall be payable *pari passu* with the other payments.

The Court: What does *pari passu* mean?

Mr. Gang: With equal step, it means in Latin.

Mr. Knupp: It means in proportion to the other deferred payments.

Mr. Gang: At this time I would like to offer this document of August 18, 1948, as part of the offer of proof which we have indicated as a letter of intention.

The Court: It may be marked as Plaintiff's Exhibit 3, for identification. [52]

(The document referred to was marked Plaintiff's Exhibit 3, for identification.)

Mr. Gang: Further, that evidence would be produced by plaintiff and Polan Banks that it was the intention of the plaintiff and Mr. Banks in negotiating for his corporation, subsequently known as Polan Banks Productions, Inc., that plaintiff would receive minimum compensation in the sum of \$150,000; that \$50,000 of said minimum compensation was to be paid in cash on the commencement of principal photography of the picture, that \$100,000 of said minimum compensation was to be deferred to be paid out of the proceeds of the picture, in exchange for which agreement on the part of plaintiff Polan Banks Productions, Inc., agreed to give plaintiff a percentage of the profits which the picture might earn.

Further, that it was not the understanding or intention of the plaintiff or of Polan Banks or Polan Banks Productions, Inc., in their negotiations to use the phrase "minimum compensation" as meaning the sum of \$50,000; that it was their understanding and intention that the phrase "minimum compensation" would be synonymous with the phrase "flat

compensation," otherwise used in the contract, and that the phrase "flat compensation" meant \$150,000; that the meaning attributed by plaintiff and by Polan Banks Productions, Inc., to the phrase "minimum compensation" in their negotiations [53] was not changed or discussed when defendant RKO entered the negotiations and prepared the contract of April 29, 1949, which is plaintiff's Exhibit 1 in this case; that there was no discussion between plaintiff and defendant with reference to the meaning of the phrase "minimum compensation" when plaintiff and defendant executed and delivered the contract of April 29, 1949; that the budget submitted by defendant to plaintiff with the letter of August 13, 1949, itself showed that plaintiff was to receive compensation in the amount of \$150,000; that Mr. Gordon E. Youngman, vice-president of defendant, and Mr. Howard Hughes, managing director-production of defendant, understood that plaintiff was to receive compensation of \$150,000, and a percentage of the profits; that the contract dated April 29, 1949, was prepared by the legal department of defendant.

We at this time offer in evidence as part of this offer of proof, and for identification, a document which has written in ink on it Defendant's Exhibit A, Samuel Rappaport, Notary Public, May 8, 1950, and in pencil "Sheridan-RKO evidence folder," which merely identifies the document which is an unexecuted agreement of blank date between Polan Banks Productions, Inc., and Ann Sheridan, and which has a letter attached which is signed by

Polan Banks Productions, Inc., by Polan Banks, dated April 12, 1949, and for clarity we would refer to this document as the first [54] draft of the contract, which will be Plaintiff's Exhibit next in order for identification.

The Court: It will be marked Plaintiff's Exhibit 4, for identification.

(The document referred to was marked Plaintiff's Exhibit 4, for identification.)

Mr. Gang: We have next a photostatic copy of an unexecuted form of contract in which the words "Polan Banks Productions, Inc., a California corporation," were stricken out by a pen strike and the words "RKO Radio Pictures" substituted, and "Delaware" substituted for "California," and various other interlineations made. This document was obtained from the legal department of defendant and it is a fact that the interlineations were made by the legal department of defendant in preparing the document which subsequently was executed by the plaintiff and defendant.

For clarity we offer this in evidence as the second draft of the contract.

The Court: It will be marked Plaintiff's No. 5, for identification.

(The document referred to was marked Plaintiff's Exhibit 5, for identification.)

Mr. Gang: Further, plaintiff will offer to prove by testimony of plaintiff and other witnesses that plaintiff and defendant were both engaged in and

members of the motion [55] picture industry, and that as such they were familiar with the customs and usages of the motion picture industry; that the evidence of the negotiations of plaintiff with Mr. Banks and with Polan Banks Productions, Inc., and the circumstances surrounding the assumption of the project by defendant, as well as the customs and usage of the motion picture industry, would show that under the circumstances of this case the phrase "minimum compensation" meant \$150,000, not \$50,000.

The Court: Does that complete the offer?

Mr. Gang: That is the completion of the offer of proof.

I assume it is deemed objected to.

The Court: Do you object to it, Mr. Knupp?

Mr. Knupp: Yes, it is objected to. That already appears from the record, if the court please. If it doesn't, it is objected to, the offer of proof, on the ground that all of the evidence offered by counsel is incompetent, irrelevant and immaterial, including not only what counsel has offered to prove by oral evidence, but also the documents which have been offered.

The Court: On the particular ground that the contract is not ambiguous, but that the meaning of the term "minimum compensation" can be spelled out from the contract between the parties itself?

Mr. Knupp: That is correct, if the court please, our contention being that the contract speaks for itself and [56] that the proper interpretation of it is

to be determined from the four corners of the instrument.

The Court: All right. The objection is sustained to the offer of proof.

Mr. Gang: With the same stipulation as preceded this offer of proof, I now make an offer of proof with reference to the issue of damages.

Plaintiff would prove by testimony of the plaintiff and other expert witnesses that the motion picture "Carriage Entrance," based upon the novel by Polan Banks, with the screen play in the form in which it had been approved by plaintiff, with plaintiff portraying the leading female role, if produced and distributed by defendant in accordance with the terms of the contract of April 29, 1949, would have grossed, taken in in receipts for the producer, an amount of money in excess of \$3,000,000; that plaintiff by reason thereof would be entitled to receive not only the sum of \$100,000 as the deferred portion of plaintiff's minimum compensation of \$150,000, but in addition thereto plaintiff would have been entitled to 10 per cent of the profits earned by said motion picture. Such testimony, as I stated before, would have been offered by plaintiff herself and by at least two experts in the motion picture industry particularly qualified to express expert opinions with reference to the earnings of a motion picture made with plaintiff portraying the leading [57] female role based on the story "Carriage Entrance" at the budget cost provided for in the contract of April 29, 1949.

Mr. Knupp: To which offer of proof the defend-

ant objects on the ground that it is incompetent and immaterial, and upon the ground that the contract itself expressly provides that the defendant is not required to use the services of the plaintiff in the picture, or to complete the production of the picture, and in the event that it does not the maximum recovery against the defendant on behalf of plaintiff is limited to the sum of \$50,000.

The Court: The court will adhere to the ruling made at pre-trial as shown in the memorandum to counsel, to the effect that paragraph 29 of the contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be, quote, “. . . considered as an integral part of the whole contract,” end of quote, as indicated in the language of the Lorentz case, and that in the circumstances listed in the first sentence of paragraph 29 the obligation of the studio, if any, could be liquidated by the payment of minimum compensation, which the court has found to be the sum of \$50,000.

The objection is sustained.

Mr. Gang: That completes the formalities on that point, your Honor.

The Court: In the second offer of proof no statement [58] was made that if witnesses were duly sworn they would so testify, but I take it counsel is making no objection as to the sufficiency of the offer of proof, but only in so far as it raises the legal questions we have been considering?

Mr. Knupp: That is correct, if the court please.

The Court: Mr. Bailiff, will you call the jury down.

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: Is it stipulated that the jurors are now present and in their proper places?

Mr. Gang: So stipulated.

Mr. Knupp: So stipulated.

The Court: Ladies and gentlemen of the jury, we have had other business to take care of while you have been gone.

Proceed, Mr. Gang.

Mr. Gang: Will you take the stand again, Miss Sheridan?

ANN SHERIDAN

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Gang:

Q. At the recess we were discussing the meeting which took place somewhere between July 14th and 16th, 1949, at [59] which time Mr. Tone came into the office. I do not know whether you completed your recollection of the substance of what took place at that meeting. My notes indicate that you were about to finish, that Mr. Tone had left and you were departing. Was anything said at the completion of that meeting?

The Court: We concluded with the testimony that the witness had said that she thought that Mr.

(Testimony of Ann Sheridan.)

Tone would do, and expressly told Mr. Sparks at that conversation, "I approve Doc Tone."

Q. (By Mr. Gang): Does that refresh your recollection? A. I believe so.

Q. Was there anything left to relate as to that conversation?

A. Yes, Mr. Sparks said that it looked like our worries were over, that our picture would be rolling right away, that all he had to do was to report to the front office, and if that was all right with Mr. Hughes then we would get started right away.

He said, upon our leaving, that he would get in touch with me with regard to wardrobe fittings, hairdressing and makeup. With that we left the studio.

Q. Is Mr. Sparks in the court room this afternoon? A. Yes, sir.

Mr. Gang: If your Honor please, would it be all right [60] if Mr. Sparks stands up so the jury can identify him as the person named?

The Court: Mr. Sparks, will you rise?

(Mr. Sparks does as requested.)

Mr. Gang: Mr. Robert Sparks.

The Court: Thank you, sir.

Q. (By Mr. Gang): What was the next meeting that took place, Miss Sheridan?

A. The next meeting was on or about the 20th of July.

Q. Where did that take place?

A. Again in Mr. Sparks' office.

(Testimony of Ann Sheridan.)

Q. What was the cast on this occasion?

A. The cast upon this occasion was Mr. Parsonnet, Mr. Stevenson, the director who had been assigned to the picture, Mr. Banks, Mr. Hickox, and myself.

I had received, prior to this meeting, a telephone call from Mr. Banks to make the appointment, incidentally, in which he had said that we had run into bad luck, that the front office had not approved Mr. Tone. And I said, "Who objects to Mr. Tone?" And he said, "Mr. Hughes." However, on the other hand, he said we were very fortunate in that Mr. Stevenson, one of the directors whom I had O.K.'d for the job, had been removed from the picture "Jet Pilot" and assigned to our picture, "Carriage Entrance."

This was the occasion for Mr. Hickox and myself to meet [61] Mr. Stevenson and to discuss the story and possible replacement for Robert Young with him. We arrived at Mr. Sparks' office at the appointed time, were introduced to Mr. Stevenson, and after the general amenities of, "So glad to have you assigned to the picture," and the usual things that are said under circumstances like that, Mr. Sparks said that it was too bad that our plans with Mr. Tone in the part of Dr. Quentin had blown up, and I asked Mr. Sparks who had objected to Mr. Tone in the part and he said Mr. Hughes. And I said, "What is his objection?" and Mr. Sparks said that Mr. Hughes wanted someone with a higher box office rating.

I said that was rather strange coming from Mr.

(Testimony of Ann Sheridan.)

Hughes, since he had submitted Mr. Ferrer who had no box office rating whatsoever, since he had only done one picture, so therefore no one knew how he would be accepted and what his rating would be.

Mr. Hickox asked Mr. Stevenson how he felt about Mr. Tone in the part, and he said he felt it would have been good casting.

I asked Mr. Sparks——

Mr. Knupp: Miss Sheridan, would you mind if I asked you to speak a little louder? I am having difficulty.

The Witness: I am terribly sorry.

I asked Mr. Sparks, then, about John Lund, and Mr. Sparks [62] said that the studio had said that he was not available.

Mr. Banks spoke up at that moment and said that he understood Mr. Lund was available but had read the script and turned it down because of such a small part.

I asked Mr. Sparks then about Mr. Conte, and he said that Twentieth Century-Fox had requested a script be sent to them for Mr. Conte's O.K., and that Mr. Hughes had declined to send the script.

Mr. Hickox then asked again about Robert Mitchum, and Mr. Sparks said that Mr. Mitchum was doing a picture called, I believe at that time, "Christmas Holiday," and would go immediately from that into "Jet Pilot," so he would not be available.

Mr. Parsonnet left the office after a general discussion of polishing the script and what-not, and Mr. Sparks asked if I would object if he asked Mel

(Testimony of Ann Sheridan.)

Berns, who had just been named the new head of the makeup office, to discuss makeup and hairdressing with me. I said, "Not at all." Mr. Berns arrived there with really no problems to discuss with him. I pointed out to him that I put on my own makeup, and Hazel, the head of the hairdressing department, said that Ruby Felker was already on the lot working, she would be finished in time and she would be assigned to my picture as my hairdresser.

That was the end of the meeting with all of us agreeing [63] to look further for another replacement.

Q. Did you have another meeting after that?

A. Yes, sir. There was another call from Mr. Banks. It was on or about the 22nd, I believe.

Q. Still in July? A. Yes, sir.

Q. Will you relate who was present on that occasion?

A. There was Mr. Sparks, Mr. Banks, Mr. Hickox, and myself.

Q. Mr. Stevenson was not present on this occasion? A. No, sir.

Q. What did you do after you got to the office of Mr. Sparks?

A. Mr. Sparks said that he had a picture he would like to run on Mel Ferrer, the picture he had done called "Lost Boundaries," and he would like to run the picture and see how I felt about Mr. Ferrer in the part of Dr. Quentin.

Q. What did you do then?

A. We went to the projection room, Mr. Banks,

(Testimony of Ann Sheridan.)

Mr. Sparks, Mr. Hickox, and myself. My secretary accompanied me that time, too. And ran the picture, "Lost Boundaries."

At the end of the picture I commented that I thought it was a very fine picture and that Mr. Ferrer was a very fine actor, but I still did not think that he was the type to play the part of Dr. [64] Quentin.

Mr. Banks said that he felt that I was right, that Mr. Ferrer was not the type. Mr. Hickox said that he didn't think that he was the type. And Mr. Sparks said that he thought we were right, that Mr. Ferrer was not the type to play the part.

With that we left the studio.

Q. The following week, which was July 25th, did you get a message to have a meeting with Mr. Sidney Rogell who was an official of the defendant?

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. In response to that message did you go to Mr. Rogell's office?

A. We went first to Mr. Sparks' office with Mr. Banks present and Mr. Hickox, where Mr. Sparks said that he wanted to warn me that Mr. Rogell had been instructed to sell me on Mel Ferrer for the part of Dr. Quentin.

The Court: Does the record show who Rogell is?

Mr. Gang: Mr. Rogell is here.

The Court: I mean his official capacity with the defendant?

Mr. Gang: It hasn't as yet.

(Testimony of Ann Sheridan.)

It may be stipulated that at that time he was an executive in connection with the operation of the studio. [65]

The Court: All right.

Q. (By Mr. Gang): Proceed.

A. Mr. Banks and Mr. Sparks escorted Mr. Hickox and I to Mr. Rogell's office. After a few moments wait we were ushered in. I beg your pardon. Are we at the 25th now?

Q. Somewhere around there.

A. I am on the wrong meeting, then.

Q. Let's go back, then. What was the next meeting you had after the meeting at which time you had your discussions with reference to makeup and hair-dressing?

A. The next meeting was on or about the 25th and it was with Mr. Rogell.

Q. After the "Lost Boundaries" picture was seen?

A. Yes, I am sorry.

The Court: It was after the meeting concerning the running of "Lost Boundaries"?

The Witness: Yes.

The Court: You had the meeting concerning—

The Witness: About the 22nd.

The Court: The meeting at which Berns came down for hairdressing, and then you had the meeting where you ran the picture, "Lost Boundaries"?

The Witness: That is correct.

The Court: And then you had the meeting with Rogell?

The Witness: Yes, sir, about the 25th. [66]

(Testimony of Ann Sheridan.)

The Court: That is what you said to start with.

The Witness: Except that there was another meeting with Mr. Rogell. I got that confused. There was one later.

Mr. Gang: May we now have the one that immediately followed the one at the time where you saw "Lost Boundaries"? Who was present?

The Witness: Mr. Rogell, Mr. Hickox, and myself.

Q. (By Mr. Gang): Where was that meeting?

A. In Mr. Rogell's office.

Q. Do you remember what time of day it was, morning or afternoon?

A. It was in the afternoon.

Q. Can you give us the gist of what was said by the parties present?

A. Yes. Mr. Rogell said, after we arrived and were ushered in, that for the record this meeting would last two hours, but actually it would take about five minutes. He apologized for my having made an unnecessary trip into town, so he said, he felt it was an unnecessary trip, but that he was in a spot and he was sure I would overlook the unnecessary trip into town. He said that Mr. Hughes had instructed him to sell me on Mel Ferrer for the part of Dr. Quentin.

I said that to please Mr. Hughes I would like to be able to say that I would accept him for the part, that I thought he was right, but I just couldn't sincerely say that I felt [67] that he was the right type for the part.

(Testimony of Ann Sheridan.)

Mr. Rogell said that even if I did go against my better judgment and accepted Mel Ferrer for the part of Dr. Quentin he couldn't guarantee me that I would have him a couple of days later, because Mr. Hughes was contemplating loaning Mr. Ferrer to Mr. Goldwyn for a picture. With that he said, "That is the end of the two-hour meeting," which actually took about five minutes of our time.

I told him that I appreciated his telling us very much, that the rush call in to town, the unnecessary trip, was quite all right, because I was going to the hospital on the following Thursday and there I was assured of a rest.

That meeting closed with our remarking in a facetious manner that probably RKO had been responsible for my going to the hospital.

Q. What was the first occasion on which you went to RKO to be fitted for your wardrobe?

A. That was on July 27th.

Q. Prior to that time had you talked to the man who had been engaged to be the dress designer?

A. Yes, I had dropped by his place several times to O.K. sketches.

Q. His name was William Travilla, T-r-a-v-i-l-l-a, is that the way you pronounce it?

A. Travilla, yes. [68]

Q. And on prior occasions you had theretofore gone over the proposed sketches with Mr. Travilla?

A. Yes.

Q. And on this day, the 27th of July you were

(Testimony of Ann Sheridan.)

there for fitting the wardrobe that had been prepared pursuant to the sketches?

A. That is correct.

Q. Tell us what happened on that occasion.

A. I fitted thirteen costumes, which took most of the day to fit, and, as a matter of fact, that was most of the costumes used in the picture. I believe we had only one or two more outfits to do.

Q. Was this a period or costume picture?

A. Yes, the setting of the picture was somewhere around the 1870's.

Q. These costumes that you were to be fitted for were period dresses that had to be fitted to your particular form?

A. In a sense my particular form. There were corsets necessary for my particular figure, and a great deal of padding around the hips.

Q. Was there a milliner who fitted hats for you?

A. Yes, a milliner from Jacques there to fit hats, and there were people from Western Costuming Company to fit capes and wraps.

Q. And was anybody there with reference to hairdressing? [69]

A. Yes, sir, Hazel came up with switches and falls to match hair for the part.

Q. I don't know that this is material. I suppose the ladies know what you mean by switches and falls. I don't. Maybe the gentlemen do. I suppose it is pieces of hair that fit in your own hair?

A. Yes, matched in color, that they could use to make me look like I had long hair.

(Testimony of Ann Sheridan.)

Q. It was after this that you entered St. John's Hospital for a check-up and rest?

A. That is correct.

Q. How long were you there?

A. I was there a week.

Q. That would bring us to sometime in early August, Miss Sheridan?

A. Yes, sir, somewhere around the 11th of August.

Q. When you came back from the hospital did you have any further meetings with any of the executives of RKO?

A. Well, it was on or about the 11th that I had the next meeting.

Q. Was that again at Mr. Sparks' office?

A. Well, this is the one that I started to talk about before, it was a call to go to Mr. Sparks' office, where Mr. Sparks warned me that we were to proceed to Mr. Rogell's office and that Mr. Rogell had been instructed again to sell [70] me on Mel Ferrer for the part of Dr. Quentin. And we were escorted to Mr. Rogell's office by Mr. Banks and Mr. Sparks, and when ushered into Mr. Rogell's office Mr. Rogell said this meeting was probably a waste of time, but that he had been instructed to sell me on either Mel Ferrer or Robert Ryan for the part of Dr. Quentin. And he asked me about Mel Ferrer, and I told him I was terribly sorry, I could not see him in the part of Dr. Quentin, I did not think he was the type.

(Testimony of Ann Sheridan.)

He said, "What about Robert Ryan?" I said, "I am terribly sorry, Ryan is not the type to play the part of Dr. Quentin." With that he mentioned Robert Preston, Richard Basehart, and Van Heflin.

To Mr. Preston I said no, I was afraid Mr. Preston was not right for the part. To Richard Basehart I said he was not right for the part. I felt that he was too young and much too short in stature to play opposite me, it would be unbelievable. As to Mr. Heflin I didn't think he was correct for the part, and I also felt that he was not available.

Mr. Hickox spoke up and asked again——

Mr. Knupp: I am awfully sorry, Miss Sheridan, I do have difficulty following you.

Q. (By Mr. Gang): A little louder.

A. Very well.

Mr. Knupp: Please. [71]

A. (Continuing): Mr. Hickox spoke up and again mentioned Mr. Tone for the part, and Mr. Rogell, delving into the lower right-hand corner drawer of his desk, brought out what is known as the producer's bible, I believe they refer to it as, it is an A.R.I. book, the Audience Research Institute, a Gallup poll book which gives box office ratings on different stars in the business. He said that Mr. Hughes wanted someone with a much higher box office rating than Mr. Tone had. He opened the book, looked up Mr. Tone, and said that his rating is only 15. Mr. Hickox asked about Robert Young's rating. Mr. Rogell evidently looked up Mr. Young's rating

(Testimony of Ann Sheridan.)

and said, "Oh, it is about the same as Mr. Tone's." And with that he put the book away.

I questioned, again, the possibility of Mel Ferrer having any box office value, if that is what Mr. Hughes was looking for, and Mr. Rogell said that I was correct, that Mel Ferrer was not mentioned in the little black book at all.

Q. (By Mr. Gang): What was the conclusion of that meeting, Miss Sheridan?

A. He said that he would advise Mr. Hughes as to our decisions, my decision, and we would have to look further.

Q. After this meeting what was the next thing you did?

A. Well, on the way back to the car—— [72]

Q. Since none of the defendants are present, you will have to omit your mental processes and just tell us what you did. Again we are back to the objective facts.

A. Very well. I am terribly sorry. I asked Mr. Hickox to get Mr. Rogell to make an appointment with Mr. Hughes, so that I could talk personally with Mr. Hughes and see if we could come to any conclusion on a leading man.

Q. Was such an appointment made?

A. Yes, sir, the following Monday, which was the 15th.

Q. Of August?

A. Of August. Mr. Rogell called, called Mr. Hickox and said that he had been very fortunate in contacting Mr. Hughes and Mr. Hughes would see me that evening at 6:45.

Q. Where was Mr. Hughes' office?

(Testimony of Ann Sheridan.)

A. We went to the Samuel Goldwyn Studio.

Q. That is on Santa Monica Boulevard about two miles from the RKO studios? A. I believe so.

Q. When you got there who was there? Anybody from RKO?

A. Yes, Mr. Rogell met us at the gate and escorted us to Mr. Hughes' office.

Q. How did you get to Mr. Hughes' office?

A. We drove in.

Q. Relate what happened from then on. [73]

A. Yes. We entered Mr. Hughes' office, Mr. Hughes came out, and after the usual greetings and introduction to Mr. Hickox, whom he did not know, he offered me the leather chair in the office, and as I was being seated he said, "Where is your war paint? You don't look like you came over here for a fight." And I said, "I didn't," I merely had come over in hopes that we could come to some decision for a leading man so we could get the picture started right away.

He said, "What is wrong with Mel Ferrer or Robert Ryan?"

I said, "There is nothing wrong with either of them, they are fine actors, but none of them are the type physically for the part."

Then he said to Mr. Rogell, "Who else has been mentioned?" Mr. Rogell said, "Richard Basehart, Van Heflin, Robert Preston."

And he said, "What is wrong with those?"

And I said, "There is nothing wrong with the

(Testimony of Ann Sheridan.)

gentlemen at all, it is merely that they are not the type physically to fit the part."

I then asked him if I could have Robert Mitchum, and he said that Mr. Mitchum was not available, that he was in a picture, and the picture wouldn't be finished.

Mr. Hickox spoke up and said he had checked the schedule [74] at the studio and found that the picture, "Christmas Holiday," would be finished within a week and Mr. Mitchum would be available. And Mr. Hughes said he was not available, he would go immediately from "Christmas Holiday" into "Jet Pilot." He said that he liked Mel Ferrer for the part, and Mr. Hickox said if he was so set on having Mr. Ferrer in the picture, why not cast him in the part of Paul instead of as the romantic interest. Mr. Hughes, getting up and striding the office, said that, "We have already promised Melvin Douglas that part," speaking of the part of Paul, and he turned to Mr. Rogell and said, "Is that right, Sid?" And Mr. Rogell said, "Yes."

He said, "We have a commitment with him."

Mr. Rogell said, "Yes, we have." "Besides, he," meaning Mel Ferrer, "doesn't like that part, he wants the part of the doctor."

I then asked Mr. Hughes his objection to Franchot Tone for the lead, and he said that he wanted someone with a higher box office rating.

Mr. Hickox then said that Mr. Tone had done very well in the last picture, "Every Girl Should Be Married," with Carey Grant and Betsy Drake. And

(Testimony of Ann Sheridan.)

Mr. Hughes said that that was right, he had done well in that, but since then he had made a lousy picture in Paris called "Man on the Eiffel Tower," and besides he didn't like him for the part. [75]

With that he turned to me and asked me to reconsider, be cooperative and come to the studio the next day to look at more film on Robert Preston, Mel Ferrer, Robert Ryan, and Van Heflin. I agreed to do this.

Mr. Rogell made a note of the list of names and made an appointment with Mr. Hickox and myself for the next day between 1:00 and 1:30 to run film.

Q. The next day was Tuesday, the 16th of August? A. Yes, sir.

Q. And you went to the studio again?

A. Yes, that's right, at the appointed time.

Q. Tell us what happened.

A. We went to Mr. Rogell's office, Mr. Rogell said that he had set the film up in the projection room and had asked Mr. Banks to go with us to run the film. We went to the projection room, Mr. Banks sat with us through the film, we saw quite a bit of film on Robert Ryan, one picture or parts of one picture, in which he played a prize fighter with a cauliflower ear, another picture in which he played a bellowing, overbearing sort of mentally unbalanced millionaire. And then we saw film on Mr. Robert Preston, wherein he was a cowboy with a beard about four days old. Then we saw more film from "Bed of Roses," which was the original picture we had seen with Mr. Ryan and Mr. Ferrer, in

(Testimony of Ann Sheridan.)

which Mr. Ryan played the part of the love interest of Miss [76] Fontaine, and again Mr. Ferrer was very little in evidence as the artist in the picture. And we saw Mr. Van Heflin in a scene from a picture with Joan Crawford. The name of the picture I would not know. The titles were not given.

Upon looking at all the film we left and went back to Mr. Rogell's office where Mr. Banks left us. We went in to Mr. Rogell's office and again he said, "What about Mel Ferrer?" And I said, "No, I am terribly sorry, he is not the type for the part."

He said, "What about Robert Ryan?"

I said, "No."

He said, "What about Robert Preston?"

And I said, "No."

And he said, "What about Van Heflin?"

And I said, "No."

At this time he was jotting down notes, and he said, "What about Charles Boyer for the part?"

And I thought for a moment and I said, "I think Charles Boyer would be very fine for the part. As a matter of fact, it should be very simple to switch the character of Dr. Quentin from a Bostonian to a Frenchman with an accent, and I feel Mr. Boyer has the necessary qualities to portray the part, but would he accept such a part?"

And Mr. Rogell said that he was having Mr. Schuessler, the casting director of the studio, check as to Mr. Boyer's [77] availability, and he would be up in his office to report within a few minutes.

Mr. Schuessler arrived and Mr. Rogell asked him

(Testimony of Ann Sheridan.)

about Mr. Boyer's availability, and Mr. Schuessler said, yes, Mr. Boyer was available.

Again Mr. Rogell went over the names of Mel Ferrer, Robert Ryan, Van Heflin, and Robert Preston, and again I gave the same answers of no, I didn't think any of them were correct.

We went back, then, to discuss Charles Boyer. I said that I didn't know that he would accept the part. They said that they were improving it in the rewrite of the script, but nobody had seen it as yet. And I doubted that they would be able to make the part big enough to be attractive to Mr. Boyer.

Both Mr. Schuessler and Mr. Rogell said that the main or the prime requisite of Mr. Boyer in any picture was that he win the girl at the end of the picture, and they were sure that he would accept this part, that it would be built up so that he would be pleased with it.

We said that was fine, wonderful, and with that left the office with Mr. Schuessler saying that he would check further and let us know.

Q. Where did you go after you left Mr. Rogell's office on the afternoon of August 16th? [78]

A. We went to Mr. Youngman's office.

Q. Mr. Youngman was then a vice-president of RKO, is that right? A. I believe so.

Mr. Gang: Mr. Youngman, will you stand up?

(Mr. Youngman did as requested.)

Mr. Gang: Thank you.

Q. (By Mr. Gang): You went right into Mr.

(Testimony of Ann Sheridan.)

Youngman's office on the same floor of the building that Mr. Rogell was on?

A. Just across the hallway, yes.

Q. After you were announced were you admitted to Mr. Youngman's office immediately?

A. Yes, sir.

Q. Was there a conversation at that time?

A. Yes, there was. Mr. Hickox, after having been introduced, my having been introduced to Mr. Youngman, whom I had not met before, and being seated, Mr. Hickox started at the signing of the contract and told Mr. Youngman everything that had happened, all the people who had been O.K.'d by me, all the things that had happened, or to the best of his recollection everything that had happened, and said that Mr. Hughes seemed to be unable to make up his mind as to actually whom he wanted in the part, and would Mr. Youngman intercede on my behalf and see if he could get some conclusion [79] on the leading man, since time was running out, and it was a very vital element at that time. Mr. Youngman said that casting was not in his line, but he would see what he could do. He turned to me and said, "You did accept Charles Boyer?" And I said, "I certainly did."

With that he said that he would check to see what he could do, and we left.

Q. Did Mr. Rogell or Mr. Youngman or Mr. Schuessler communicate with you again after that date?

A. No, sir.

Q. What was the next thing that happened?

(Testimony of Ann Sheridan.)

A. I got a letter cancelling my contract.

Mr. Gang: We offer next in evidence, your Honor, the letter from defendant to plaintiff, dated August 17, 1949.

The Court: It will be received as Plaintiff's 6 in evidence.

(The document referred to was marked Plaintiff's Exhibit 6, and was received in evidence.)

Mr. Gang: I think it is stipulated that the witness received this, in the pre-trial memorandums. I won't show it to her.

The Court: So stipulated. You may read it to the jury if you desire.

Mr. Gang: This letter is on the letterhead of RKO, it is dated August 17, 1949, it is addressed to Miss Sheridan [80] and it reads as follows:

"Dear Miss Sheridan:

"Please refer to the agreement of employment between us dated April 29, 1949, relating to your employment in connection with the photoplay, "Carriage Entrance."

"We have heretofore and from time to time discussed with you and submitted to you for your approval as the actor to portray the leading male role in said photoplay the names of Robert Preston, Richard Basehart, Robert Ryan, Van Heflin and Mel Ferrer, any one of whom would have been eminently qualified to portray said leading male role. You have ad-

(Testimony of Ann Sheridan.)

vised us that you did not approve any of these five actors so submitted to you for your approval.

"The term of your employment under said agreement of employment commenced on July 6, 1949, but by reason of your failure and refusal to approve one of said actors to portray said leading male role, we have been unable to proceed with the production of said photoplay. We have incurred a large amount of costs in connection with the proposed production of the photoplay and the delay, by reason of [81] your failure and refusal to approve a leading man, has caused us to incur a large amount of expenses which would not have been so incurred had you approved one of the names heretofore submitted to you. We can no longer continue to incur these costs or delay the production of the photoplay.

"By reason of your failure to approve an actor to portray the leading male role in said photoplay, we will not utilize your services in said photoplay and we will not pay you any compensation whatsoever in connection therewith.

"Very truly yours,

"RKO RADIO PICTURES,

"INC.,

"By /s/ GORDON E. YOUNGMAN,

"Vice President." [81-A]

Q. (By Mr. Gang): Up to and including August 16, 1949, had Mr. Rogell, Mr. Banks, Mr.

(Testimony of Ann Sheridan.)

Sparks, or Mr. Hughes, or anyone else, told you that any particular actor was assigned to portray the leading male role in the picture? A. No, sir.

Q. Up to and including August 16, 1949, had you refused to approve any man assigned to the role by defendant?

A. I beg your pardon. Would you repeat that, please?

(The question was read by the reporter.)

Mr. Gang: Is that not clear to you?

The Witness: No.

Q. (By Mr. Gang): Had the defendant told you that they had picked a man who would portray the role and you could either disapprove or approve him? A. No, sir.

Q. You received the notice of termination, which is dated August 17th, sometime on Friday, the 19th of August, is that right? A. That's correct.

Q. And that was the first notification you had of what the defendant had done, is that correct?

A. That's right.

Q. When did you first learn that the defendant proceeded to make the motion picture, "Carriage Entrance"?

A. A couple of weeks later when I read in the papers [82] that Mr. Mitchum and Miss Gardner had been assigned to the picture.

Q. And the next picture that Mr. Mitchum did for the defendant after finishing "Christmas Holiday" was not "Jet Pilot," but was "Carriage Entrance," is that correct?

(Testimony of Ann Sheridan.)

A: That's correct, yes.

Q. Prior to July 6th, 1949, on June 29, 1949, you signed a letter requested by defendant, did you not? I will show it to you. A. Yes.

Mr. Gang: By the way, your Honor, these are all part of the documents stipulated in the pre-trial.

The Court: Yes, I notice the stipulation says a letter from defendant to plaintiff.

Mr. Gang: That is correct. Didn't I say that?

The Court: You said something about her signing it.

Mr. Gang: It was sent to her, but a receipt was indicated and she signed it.

The Court: All right. It will be received as Plaintiff's No. 7, a letter of June 29, 1949, in evidence.

The Clerk: Plaintiff's Exhibit 7 in evidence.

(The document referred to was marked Plaintiff's Exhibit 7, and was received in evidence.)

Mr. Gang: This is dated June 29, 1949. [83]

"Dear Miss Sheridan:

"This will confirm our agreement in connection with the agreement of employment between us dated April 29, 1949, which agreement, as heretofore amended, is hereinafter referred to as the 'employment agreement.'

"It is hereby mutually agreed that the date not later than which we are to deliver to you a copy of the final budget for 'Carriage Entrance' and a list of all deferments payable out of the

(Testimony of Ann Sheridan.)

receipts from 'Carriage Entrance' as provided in Article 7 of said Employment Agreement shall be postponed to and including July 25, 1949."

The Court: Then down at the bottom there of it it is signed "Agreed to: Ann Sheridan."

Mr. Gang: I might state, your Honor, that the contract had certain dates and it was required that Miss Sheridan waive those dates.

The next document is dated July 8, 1949, it is addressed to the plaintiff and is agreed to by the plaintiff. We offer that as our next exhibit.

The Court: Received as Plaintiff's Exhibit 8 in evidence. You may read it. [84]

(The document referred to was marked Plaintiff's Exhibit 8, and was received in evidence.)

Mr. Gang: With your permission I will omit the first paragraph, which is the same in all, referring to the employment contract. The gist of it is in the second paragraph:

"You hereby agree that notwithstanding anything to the contrary contained in said Employment Agreement, and particularly without limiting the generality of the foregoing, notwithstanding anything to the contrary contained in Article 30 of said Employment Agreement, in the event we cast Mr. Melvin Douglas in the motion picture 'Carriage Entrance,' in connection with which you are to render your services

(Testimony of Ann Sheridan.)

pursuant to the Employment Agreement, we may, at our election, but without obligation so to do, give said Melvin Douglas co-star billing in third position of the co-stars in the same size of type as the size of type used to display your name in such co-star billing.”

The Court: That concerned Melvin Douglas’ part in a part other than that of Dr. Quentin?

Mr. Gang: That is correct, your Honor. That was the [85] second male lead.

The next document we offer is dated July 11, 1949, addressed from the defendant to the plaintiff.

The Court: Received as Plaintiff’s Exhibit 9 in evidence.

(The document referred to was marked Plaintiff’s Exhibit 9, and was received in evidence.)

Mr. Gang: On this one it does not bear Miss Sheridan’s signature, but it is stipulated that she did agree to it.

Again I will read only the second paragraph of this letter of July 11, 1949:

“Your signature in the space provided below will constitute your approval of William Travilla as the costume designer to design the wardrobe to be worn by you in connection with said motion picture ‘Carriage Entrance.’ ”

The next one will be July 25, 1949.

The Court: Letter of July 25, 1949, from defendant to the plaintiff will be received as Plaintiff’s Exhibit 10 in evidence.

(Testimony of Ann Sheridan.)

(The document referred to was marked Plaintiff's Exhibit 10, and was received in evidence.)

Mr. Gang: Again, the second paragraph of this letter of July 25, 1949, reads as follows: [86]

"It is hereby mutually agreed that the date not later than which we are to deliver to you a copy of the final budget for 'Carriage Entrance' and a list of all deferments payable out of the receipts from 'Carriage Entrance' as provided in Article 7 of said Employment Agreement shall be further postponed to and including August 15, 1949."

Signed by defendant by Gordon E. Youngman, Vice-President.

The next document will be a letter dated August 13, 1949, attached to which is a batch of pink papers dealing with the budget. We offer it as the next exhibit.

The Court: It will be received as Plaintiff's Exhibit 11 in evidence.

(The document referred to was marked Plaintiff's Exhibit 11, and was received in evidence.)

The Court: You are not going to read the budget, are you?

Mr. Gang: No, I am not. I shall not attempt to read this lengthy document, but merely call to your attention that it was sent out under date of August 13, 1949, and it was in accordance with the provisions of Article 7 which you have heard men-

(Testimony of Ann Sheridan.)

tioned before, under which plaintiff was to be apprised of the list of deferments and to get a [87] copy of the budget, and this document in question shows the items required under Article 7, and I direct the attention of counsel, the court, and jury to the last sheet which shows that the character of Barbara to be portrayed by Ann Sheridan, the amount of compensation is listed as \$150,000, and it shows the part of Paul to be portrayed by M. Douglas, and that at that time, on August 13th, the part of Quentin had an estimated cost of \$100,000, but no actor had as yet been assigned to the picture by defendant.

I shall conclude the direct examination, your Honor, with offering in evidence a copy of the resolution given to me by counsel for the defendant with reference to Mr. Howard Hughes, and I would like to offer that in evidence and be permitted to read it to the jury.

Mr. Knupp: If the court please, that letter, of course, is part of the deposition that was taken in this matter. I have no objection to stipulating with Mr. Gang as to the contents of the letter, as far as that is concerned.

Mr. Gang: That is all I want. May I read it, then?

Mr. Knupp: Just state what the effect of the letter is, and we will stipulate to it.

Mr. Gang: Thank you very much. This document—I don't want the document; I just want the fact in the record.

(Testimony of Ann Sheridan.)

The Court: You are stipulating to certain facts now, you are not going to put this letter in evidence? [88]

Mr. Gang: No.

The Court: All right.

Mr. Gang: The facts have to do with the position of Howard E. Hughes with defendant, and his authority.

Mr. Knupp has given to me from the official records of the corporation the following information, which I accept as true: Section 3A of Article IV of the By-laws of said corporation read as follows:

“Section 3A. Managing Director-Production.

The managing director-production shall be the executive officer of the corporation in charge of all motion picture production. Subject to the control and direction of the board of directors and of the president, the managing director-production shall have full authority to formulate production programs and policies, to operate the motion picture production studios of the corporation, and to have general supervision of the motion picture production business of the corporation. He shall have the power to sign, on behalf of the corporation, contracts and other instruments relating to its motion picture production business when authorized by the board of directors.

“(b) That Howard R. Hughes”—— [89]

Is it “R”?

Mr. Knupp: R.

(Testimony of Ann Sheridan.)

Mr. Gang: It is Howard R. Hughes.

“That Howard R. Hughes is the managing director-production of said corporation, having been elected to such office by the adoption of the following resolution at a meeting of the board of directors of said corporation held July 9, 1949, a quorum being present and acting throughout: Resolved that Howard R. Hughes be, and he hereby is, elected the managing director-production of this corporation, to hold office in accordance with its by-laws and applicable law.”

The Court: Those facts are stipulated, Mr. Knupp, are they?

Mr. Knupp: Yes, if the court please, that is stipulated to.

Mr. Gang: As soon as I clean up my debris here I will relinquish this spot to Mr. Knupp.

The Court: Ladies and gentlemen of the jury, a stipulation as you probably know—it won't hurt to tell you about it. Counsel used the word “stipulation.” It refers to an agreement between the two sides of the law suit that a certain fact is true, or it is an agreement to some effect, so [90] when counsel stipulate you may take those facts to which they stipulate as having been proven.

Mr. Knupp: Was the date of the passage of that resolution indicated?

Mr. Gang: It says July 9, 1949. That is the only date I remember from it.

(Testimony of Ann Sheridan.)

Mr. Knupp: That is correct.

Mr. Gang: Plaintiff has completed its direct examination of the witness.

The Court: You may cross-examine, Mr. Knupp.

Mr. Knupp: Do you take a recess in the middle of the afternoon?

The Court: We can take one now or we generally take one about 3:15 or 3:30. Would you prefer one now?

Mr. Knupp: If it suits your Honor's convenience.

The Court: Your convenience is as important as mine, Mr. Knupp.

The jury will be excused for a short recess. Ladies and gentlemen of the jury, the court admonishes you of your duty not to converse or otherwise communicate among yourselves or with anyone upon any subject touching the merits of the cause on trial. You are not to form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire.

(Whereupon the jury retired from the court room.) [91]

The Court: Court will recess.

(A recess was taken.)

The Court: Is it stipulated that the jurors are present and in their proper places?

Mr. Knupp: So stipulated.

Mr. Gang: So stipulated.

(Testimony of Ann Sheridan.)

The Court: Proceed, Mr. Knupp.

Cross-Examination

By Mr. Knupp:

Q. Miss Sheridan, you mentioned a man named Hickox in your testimony. A. Yes, sir.

Q. Who was or is Mr. Hickox?

A. He is my business manager.

Q. How long has he been your business manager?

A. He has been with me about fourteen years.

Q. Was he with you on all of the occasions to which you have testified when you visited the studio?

A. Yes, sir.

Q. And Mr. Hickox generally made these arrangements for your visits to the studio, is that correct? A. Sometimes he did, yes.

Q. But on all of the occasions to which you have testified and at all of the conversations to which you have testified, Mr. Hickox was present? [92]

A. Yes, sir, he was there.

Q. I think you said that the first mention that was made of the name of Mel Ferrer or Robert Ryan was at a meeting which you had sometime between July 8th and July 11th?

A. I believe so, yes, the second trip to the studio.

Q. And prior to that time had it been determined that Robert Young would not portray this role?

A. Yes, sir, at the first meeting.

(Testimony of Ann Sheridan.)

Q. And the first meeting you said occurred about July 5th?

A. Between the 5th through the 7th, somewhere in there, yes.

Q. In that connection, Miss Sheridan, the fact is that Robert Young didn't refuse to play this role until July 11th, so far as any written refusal is concerned. I call your attention to that fact because I don't want you to be confused as to the date.

A. To my recollection it was before the 11th that we had the meeting. I believe that Mr. Rogell said in his deposition that he received a telephone call from Mr. Nat Goldstone saying that Mr. Young would not do the part. That could have been before the 11th.

Q. It was before the 11th that you got the information? A. I believe so, yes.

Q. Had you talked to Mr. Rogell before that time about [93] the matter? A. No, sir.

Q. I beg your pardon? A. No, sir.

Q. When Mel Ferrer was mentioned to you as a possibility for the leading role in this play, did you know Mr. Ferrer personally? A. No, sir.

Q. Had you ever seen any picture in which he had appeared?

A. No, not when he was first mentioned.

Q. You, as a matter of fact, had been abroad for some time?

A. I had been abroad for seven months.

Q. Eleven months? A. Seven months.

(Testimony of Ann Sheridan.)

Q. Had you learned anything before that time about Mr. Ferrer's work as a motion picture actor?

A. Before that time, no, sir. He hadn't made any pictures before that that had been released.

Q. Did you know before August 8th or 11th, whenever this meeting occurred, did you know Robert Ryan personally? A. No, sir.

Q. Had you ever seen him in any motion picture prior to that date? [94]

A. Prior to the 11th?

Q. Prior to the 11th of August.

A. Only what had been run at the studio.

Q. You hadn't seen anything at the studio prior to August 11th?

A. Yes, "Bed of Roses," in which Mr. Ryan and Mr. Ferrer both played.

Q. I understood your testimony to say that that was run for you on August 11th.

A. It was, it was run again, part of the film was run at the second meeting when Mr.——

Q. When was the first meeting when you saw any film at the studio?

A. It was the second meeting there which had been between the 8th and 11th of July, somewhere along in there.

Q. Fixing that as the date, had you ever seen any picture in which Mr. Ryan had appeared?

A. Yes, sir.

Q. Did you see any pictures in which he appeared other than those that were shown to you at the studio after that meeting?

(Testimony of Ann Sheridan.)

A. After that meeting?

Q. Yes. A. No, sir.

Q. And prior to August 17th? [95]

A. No, sir.

Q. So that all of your knowledge with respect to Mr. Ryan's ability or capability as a motion picture actor was determined from what you saw in the film at the studio? A. That's right.

Q. Either on this occasion or on the subsequent occasion when it was re-run, is that correct?

A. That's correct.

Q. I think you said there was some conversation after you saw this film, some conversation with Mr. Banks and Mr. Hickox and Mr. Sparks, about what they thought about the availability of Mr. Ferrer or Mr. Ryan, I shouldn't say "availability"—I mean whether or not either of those gentlemen were proper casting in this part. A. Yes, sir.

Q. And I think you said then at the time that you didn't think either of them were proper casting for the part? A. That is correct.

Q. Did you then express any opinion as to why you didn't think they would be properly cast in that part?

A. I don't know that I pointed out exactly all the things that were discussed later. I did say that I didn't think they were the physical type, I didn't think they would be believable in the type of the doctor.

Q. Did you say that on the first occasion when you saw [96] this film? A. I believe so, yes.

(Testimony of Ann Sheridan.)

Q. Did you say that with respect to both of these men? A. Yes, sir.

Q. Tell me what Mr. Banks said with respect to that matter? He was present.

A. He said he was inclined to agree with me.

Q. And Mr. Hickox, your manager?

A. Yes, he said he felt I was right.

Mr. Gang: Excuse me. Just a moment. I think Mr. Knupp misspoke when he said "manager." Miss Sheridan said "business manager."

Mr. Knupp: To be perfectly frank with you, Mr. Gang, I didn't know there was any difference between a manager and business manager.

Mr. Gang: If there is, I would like to maintain that difference.

Mr. Knupp: If there is any difference. I intended to say "business manager."

Q. (By Mr. Knupp): You say Mr. Sparks was in agreement with these other gentlemen?

A. Yes.

Q. Mr. Sparks, I assume had been at the studio some time, for some years prior to this time, Miss Sheridan, had he not, to your knowledge? You knew Mr. Sparks, didn't you? [97]

A. Yes, I have known Mr. Sparks for many years.

Q. Did Mr. Sparks say anything to you before you went in to see the picture about his belief with respect to whether or not Mr. Ryan or Mr. Ferrer would be proper casting in this part?

(Testimony of Ann Sheridan.)

A. No. He merely said that they were running some of the film to see what I thought of them.

Q. And he asked you to go in to look at this film in order that you could determine whether or not, if either one were proposed for this role, you would be agreeable?

A. I beg your pardon. I didn't quite get that.

Q. He asked you to go in and look at the film in order to determine if you would approve either of these men if they were assigned to this role?

A. Yes, sir.

Q. And he didn't, before he took you in to see the film, suggest to you that he didn't think that either of them were proper casting for the part?

A. No.

Q. Did you ever talk to Mr. Stevenson, the director, about the question of whether Mr. Ferrer or Mr. Ryan were proper casting for this part?

A. Not to my recollection, no.

Q. Mr. Stevenson was present at one meeting, I think you said? [98]

A. That's correct.

Q. And at that meeting was the question of who was to be assigned to this leading male role discussed at all?

A. To some extent, yes.

Q. And was Mr. Ryan's name mentioned at that time?

A. Not that I recall.

Q. Was Mr. Ferrer's name mentioned?

A. Not that I recall.

Q. So that as far as you now recall Mr. Stevenson never expressed any opinion in your presence respecting the matter of whether Ferrer or Ryan

(Testimony of Ann Sheridan.)

or any of these other people were proper casting for this part?

A. No, sir; he just had been assigned to the picture.

Q. You said, I think, that Mr. Sparks mentioned the possibility that Mr. Tone might be assigned to this part. Do you recall just what Mr. Sparks said in that respect? A. Yes.

Q. Will you tell us what that was?

A. Yes. I was looking through the casting directory at Mr. Spark's request, he said, "How about Franchot 'Tone?'" I said I didn't know, I would think about it. He might be interesting in the part. He said that Mr. Tone was on the lot and would I object if he called Mr. Tone in so that he could see the two of us together. I said certainly not, that I hadn't seen Mr. Tone in ages and I would be very happy [99] to see him. He called Mr. Tone in.

Q. I think you said then, after talking to Mr. Tone, that you would be satisfied with him in the part?

A. Yes, sir, I said he was acceptable.

Q. And did Mr. Sparks then tell you that the question of whether Mr. Tone would be assigned to the part would depend upon what the head of the production department said about it, something to that effect?

A. Yes, he said he would have to take it up with the front office, yes.

Q. How long thereafter was it before you

(Testimony of Ann Sheridan.)

learned that the studio was not satisfied to assign Mr. Tone to the part?

A. Within the next two or three days.

Q. And who told you that?

A. First Mr. Banks by telephone.

Q. And then later Mr. Sparks confirmed it?

A. That's correct.

Q. I think you said that on August 16th you had this meeting in Mr. Rogell's office? A. Yes.

Q. And at that time, as I understand you, Mr. Rogell said to you, "What is wrong with Ryan?"

A. No; he asked me how I felt about Mr. Ferrer in the part, or Mr. Ryan in the part, and I repeated what I had told him many times. [100]

Q. Many times? A. Well, several times.

Q. When had you discussed this matter with Mr. Rogell prior to that time?

A. I had discussed Mel Ferrer with him prior to that on one previous occasion.

Q. When was that?

A. After the picture, "Lost Boundaries," was run, that would be about the 25th of July, I believe.

Q. And had you discussed with him the assignment of Mr. Ryan to the part before?

A. No, sir.

Q. So that this was the first time that you had intimated or told Mr. Rogell that you would not approve Ryan in the part?

A. Well, I had told Mr. Sparks previously, and I know that was passed on to Mr. Rogell. It is the first time I personally told him, yes.

(Testimony of Ann Sheridan.)

Q. Miss Sheridan, I would like to have you answer the question with respect to your conversation with Mr. Rogell. This was the first time, was it not, that you intimated or told Mr. Rogell that you would not approve Ryan in the part?

A. Yes, sir.

Q. What did you say to Mr. Rogell was the reason why you would not approve Ryan? [101]

A. I didn't think he was the type for the part.

Q. Did you tell Mr. Rogell that you had seen him in nothing except this one film at that time, "Bed of Roses"? A. I don't know that I did.

Q. At any rate, whatever conclusion you reached with respect to Mr. Ryan or, so far as that is concerned, on Mr. Ferrer, was reached by reason of what you saw in this one film, "Bed of Roses," is that correct?

A. "Bed of Roses" and "Lost Boundaries," with Mr. Ferrer.

Q. Did Mr. Rogell tell you that the studio was willing to assign and would assign either Ryan or Ferrer to the part if you would approve?

A. I don't recall that he did. He merely asked me if I would approve him.

Q. And he didn't intimate to you that the studio would be glad to assign either one of those to the part if you would approve him?

A. On this particular occasion? Which one are you talking about?

Q. This occasion or any other occasion, Miss Sheridan.

(Testimony of Ann Sheridan.)

A. He merely said that Mr. Hughes was set on having Mr. Ferrer play the part, that's all.

Q. There wasn't any question in your mind, was there, from what was said to you, that if you would approve either one of these two gentlemen the studio would assign the one [102] that you approved to this part?

A. Yes, there might have been some question in my mind.

Q. You mean you didn't understand that if you approved either one of these two men the studio would assign that man to this part?

A. No, because of something Mr. Rogell himself had said earlier.

Q. Did you ask Mr. Rogell or anybody else at the studio whether or not if you approved they would assign the person that you approved to the part? A. No, sir.

Q. I think you said that Mr. Rogell also proposed at this meeting on August 15th the name of Mr. Robert Preston for the part?

A. That is right.

Q. Did you know Mr. Preston personally?

A. No, sir.

Q. Had you ever seen him in a motion picture?

A. I had seen him in motion pictures, yes.

Q. What pictures had you seen him in?

A. I wouldn't know the titles.

Q. Do you remember the title of any picture you ever saw Robert Preston in?

A. No, I don't recall that I do.

(Testimony of Ann Sheridan.)

Q. Do you know how long it had been prior to this date [103] that you had seen Robert Preston in a motion picture? A. No, sir.

Q. When Mr. Rogell suggested the name of Robert Preston to you did he state to you that if Preston was satisfactory the studio would assign him to the role? A. No, sir.

Q. Did you know Richard Basehart on August 15, 1949? A. No, sir.

Q. Had you ever seen Mr. Basehart in a motion picture? A. Yes, I had seen him in one.

Q. What picture did you see him in?

A. I don't know the name of it.

Q. How long had it been before this that you saw him in a picture?

A. That I couldn't say, either.

Q. Did you see Mr. Basehart or Mr. Preston in any pictures subsequent to August 15 and before August 17th in an effort to determine whether or not they might be proper casting?

A. Subsequent to the 15th and before the 17th?

Q. Between the 15th and the 17th when the contract was terminated?

A. I saw Mr. Preston, yes.

Q. Did you see Mr. Basehart?

A. No, sir. [104]

Q. Did you on August 15th recall the picture in which you had seen Mr. Basehart?

A. No, sir.

Q. Do you recall, or did you then, or do you now

(Testimony of Ann Sheridan.)

recall what sort of a part Mr. Basehart played in that picture?

A. He played the gangster, a psychological killer.

Q. And you don't remember the name of the picture? A. No, sir.

Q. Do you remember who played with Mr. Basehart in the picture? A. No, sir.

Q. Had you seen Mr. Basehart prior to that time in more than one picture, Miss Sheridan?

A. I don't believe so, no.

Q. You had, of course, seen Van Heflin in pictures? A. Yes, sir.

Q. When Mr. Rogell suggested Mr. Van Heflin's name as a possible actor for this part, what did you say to Mr. Rogell about Van Heflin?

A. I said that I didn't think that he was the type to play the part of the doctor. I also didn't think he would be available.

Q. So on August 15th, so far as any of these men who were mentioned to you then, that is to say, Ryan, Ferrer, Basehart, and Van Heflin, you said distinctly that you would [105] not approve any of them?

A. That I did not approve them, that's correct.

Q. Now, you said, I think, the next day or August 15th, that evening, you talked to Mr. Hughes and Mr. Rogell at Mr. Hughes' office at the Goldwyn Studios? A. Yes, sir.

Q. And Mr. Hughes asked you if you wouldn't then, the next day, look at some film of some of these men in order to see if you couldn't be con-

(Testimony of Ann Sheridan.)

vinced that one of them might be available for this part, is that correct? A. Yes, I believe so.

Q. And on August 16th you returned to the studio and you saw some film? A. Yes, sir.

Q. Tell me, Miss Sheridan, what film you saw on August 16th at the studio?

A. There were no titles given. I saw film on Mr. Ryan.

Q. How much film on Ryan did you see?

A. That I wouldn't know, how much.

Q. Was it a picture of Ryan that you had seen before? A. No.

Q. Was this a new picture?

A. There were excerpts from two pictures run with Mr. Ryan, three actually. One was "Bed of Roses," they ran more of that, and the other two were pictures that I had not seen. [106]

Q. And do you remember what roles Mr. Ryan played in those pictures?

A. Yes, sir; in one he played a punch-drunk prize fighter with a cauliflower ear, and in the other one he was an overbearing, bellowing sort of mentally unbalanced person.

Q. Those were the two other than "Bed of Roses," and in "Bed of Roses" what part did he play?

A. He played one of the romantic interests of Miss Fontaine in the picture.

Q. That is Joan Fontaine?

A. That is correct.

Q. I think Miss Fontaine is generally recognized—I probably shouldn't ask this of you, but I

(Testimony of Ann Sheridan.)

think you probably are a capable witness on the point—she is recognized as one of the leading stars in the motion picture world?

A. That's correct.

Q. And you said you saw some film of Ferrer?

A. Yes; more of "Bed of Roses."

Q. What part did Ferrer play in that?

A. He played an artist. He was very little in evidence.

Q. And you had seen previous to that time a film entitled "Lost Boundaries," in which Ferrer appeared.

A. That's correct.

Q. What part did he play in that picture?

A. He played the part of a Negro physician that was [107] passing as white.

Q. I think you also said that you saw some film in which Robert Preston appeared?

A. That's correct.

Q. Do you recall the title of that film.

A. No titles were given.

Q. What part did Mr. Preston play?

A. A cowboy.

Q. Do you recall anybody else that appeared with him in the film?

A. Yes; Mr. Mitchum was in it.

Q. Mr. Mitchum and Mr. Preston were in the film?

A. That's right.

Q. Do you remember was there a feminine lead?

A. There was, but she wasn't much in evidence. I don't know who it was.

Q. You don't know who it was?

(Testimony of Ann Sheridan.)

A. No, sir.

Q. You cannot now give us the title of the film which you saw on August 16th at RKO in which Robert Preston appeared? A. No, sir.

Q. And I think you said that so far as Preston was concerned this film that you saw on August 16th at RKO was the only—I don't know what you said—did you say that was the only film you saw of Preston? [108]

A. No; I said I had seen him previous to that.

Q. You saw no film in which Basehart appeared?

A. No, sir.

Q. Miss Sheridan, you went into one of the theatres at the studio in order to see these films?

A. Yes, sir.

Q. You went, as I understand it, from Mr. Rogell's office?

A. Yes, on the 16th, that's correct.

Q. And you were accompanied by Mr. Hickox and Mr. Banks? A. That is correct.

Q. And Mr. Sparks?

A. Not Mr. Sparks. Just Mr. Banks.

Q. Just Mr. Banks and Mr. Hickox and yourself? A. Yes.

Q. All three of you were together, I suppose, on the occasion when you viewed these films?

A. Yes, sir.

Q. And when you came out and left the theatre and went to the office of Mr. Rogell did all three of you go together? A. Yes, sir.

Q. Was there any conversation, Miss Sheridan,

(Testimony of Ann Sheridan.)

during the time that you were either viewing these pictures at [109] RKO or after you had viewed the pictures and before you got to Mr. Rogell's office, with respect to the selection of the character for the leading male role?

A. Not that I recall, no, sir.

Q. Was there any conversation between Mr. Banks and Mr. Hickox that you overheard respecting the matter? A. No; Just general chatter.

Q. Specifically, Miss Sheridan, I ask you whether or not on that occasion you heard Mr. Hickox, your business manager, ask Mr. Banks whether or not he didn't think that there might be some difficulty about this picture starting, and whether or not he thought RKO would be willing to pay you the sum of \$50,000 and release you from your commitment?

A. No, sir, I heard no such conversation.

Q. You heard no such conversation?

A. No, sir.

Q. And Mr. Hickox never related any such conversation with Mr. Banks to you at any time thereafter? A. No, sir.

Q. Did you at any time, Miss Sheridan, say to anybody, either in the meeting with Mr. Hughes on August 15th or in any of these various meetings to which you have referred, that you wanted to know whether or not if you approved these proposed actors for this role RKO would assign the one that you approved to the role? [110]

A. I am terribly sorry. Would you repeat that?

(Testimony of Ann Sheridan.)

The Court: Read it, Mr. Reporter.

(The question was read by the reporter.)

The Witness: No, sir.

Mr. Knupp: That is all, if the court please.

Mr. Gang: No redirect, your Honor.

The Court: You may step down, Miss Sheridan.

The Witness: Thank you.

Mr. Gang: Call Mr. Perry Lieber and his files.

PERRY LIEBER

called as a witness under Rule 43 (b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

Mr. Gang: How late does your Honor run in the afternoon?

The Court: We generally go to 4:30. Is that all right?

Mr. Gang: Yes.

The Court: Is that all right with you, Mr. Knupp?

Mr. Knupp: Yes, if the court please.

The Clerk: State your name, please.

The Witness: Perry Lieber.

The Court: Is this witness called under 43 (b) of the Civil Rules?

Mr. Gang: Yes, your Honor. He is an official of the defendant. [111]

The Court: The rules provide that a party or an employee or official of a party may be called as an adverse witness under the Rules of Civil Procedure,

(Testimony of Perry Lieber.)

and questioned as if he were on cross-examination, which means that the plaintiff may call an official of RKO and question him as if he were on cross-examination and not be bound by his testimony, but ascertain such facts as are material from the cross-examination.

Mr. Gang: I trust that I might tell the jury that I don't consider Perry Lieber adverse in any sense.

Direct Examination

By Mr. Gang:

Q. Will you state your position with the defendant?

A. Publicity director at the RKO Studios.

Q. How long have you occupied that position?

A. About the last 11 years.

Q. How many people are employed under you in that department?

A. At the time of "Carriage Entrance" there were seventeen. Since that time the department has been increased somewhat.

Q. Increased? A. Yes.

Q. Can you state briefly to the court and jury enough about the operations of your department so the rest of your testimony will be somewhat more intelligible? [112]

A. It is the duty of my department to publicize and exploit the motion pictures made by RKO Radio Pictures, and their personalities.

Q. In doing so you are kept informed as to what is going on in the studio, generally speaking?

(Testimony of Perry Lieber.)

A. Yes, sir.

Q. And from whom do you get your instructions as to what pictures are to be exploited?

A. From the production head of the studio.

Q. And at the time in question in this litigation it was Sid Rogell, was it not?

A. That is correct.

Q. Did you during this period of time, and I restrict my questions to the time involved in this litigation, which is roughly from April of 1949 until October of '49, did you get any instructions from Mr. Howard Hughes?

A. No, sir, I did not.

Q. In other words, Sid Rogell was your contact with the front office?

A. That is correct.

Q. And in your work you maintain a file in which you keep information with reference to the activities on a particular project?

A. I do.

Q. And you have such a file entitled "Carriage Entrance"? [113]

A. I do.

Q. And you have heretofore examined that file and have found no written instructions from either Mr. Hughes or Mr. Rogell to you with reference to that picture?

A. That is correct, yes, sir.

Q. In other words, whatever instructions you got were oral?

A. Correct.

Q. From time to time you did have occasion to speak with Mr. Hughes about the activities of your department, did you not?

A. Yes, sir.

Q. And where did you meet with him when you did meet?

(Testimony of Perry Lieber.)

A. I would meet in one of three places; either at his office at the Goldwyn Studios, at the Players Restaurant, upstairs of the Players Restaurant, or at the Beverly Hills Hotel.

Q. And during the entire time in question you never spoke to Mr. Hughes on the RKO lot?

A. No, sir, I did not. That is, not in person. I have many times on the phone.

Q. On the phone? A. Yes.

Q. Would you call him or would he call you?

A. Both. [114]

Q. You brought your file with you, Mr. Lieber. Will you direct your attention to it and find the item dated August 11, 1949?

A. Is this in the——

Q. For the purpose of locating it, refer to your deposition, which we are not using as yet, but you can use it to identify the document. Look on page 10, line 19. That relates to the idea which you were discussing with one of your assistants, Mr. Margulies.

The Court: The particular question concerns an item of August 11, 1949.

The Witness: This is going to be awfully tough, Martin, to identify. I haven't got them in chronological order here.

Q. (By Mr. Gang): May I call your attention to the fact that this was a memorandum of a discussion between your unit man, as you called him, and yourself, about converting the Carey mansion from "Bed of Roses" into an old New Orleans

(Testimony of Perry Lieber.)

home for "Carriage Entrance." Would that help you locate that, dated August 11, 1949? You and I went over it at the time of the deposition and it was the first item we came across. Is it there?

Mr. Knupp: Perhaps Mr. Gang could find the particular item he refers to in the file.

Mr. Gang: You do me great honor. I don't know Mr. Lieber's files. [115]

Mr. Knupp: You have been over them.

Mr. Gang: It really isn't that important.

The Witness: I am just wondering whether it isn't in this other file in printed form.

Mr. Gang: I can't say. Let's pass on from that. Do you remember the discussion with Mr. Margulies about having a costume party on that set?

The Witness: Yes, I do.

Q. (By Mr. Gang): Was there also discussion at or about that date, August 11th, with reference to getting what you called a color layout of Ann Sheridan in her fancy wardrobe?

A. There was, yes, sir.

Q. The point I make is as of August 11, 1949, you and your department were proceeding with plans for publicizing "Carriage Entrance," were you not? A. That is correct.

Q. The next item we find is August 15, 1949, on page 12, Mr. Lieber, also dealing with possible picture layouts on "Carriage Entrance" which might be of interest to magazines, national or fan magazines.

A. I might add the reason those clippings aren't

(Testimony of Perry Lieber.)

here, Martin, is those were memos that we discussed at that time.

Q. What has happened to them?

A. I will have to look and see if we can find them. They are not in this file. [116]

Q. Do you remember the discussions?

A. I do.

Q. The purpose of them, of course, is to refresh your recollection as to what took place back in August. Do you remember the discussion with Mr. Milt Howe of your department of this so-called magazine layout for Ann Sheridan in "Carriage Entrance"? A. I do.

Q. That was about the 15th of August?

A. Right along in there.

Q. I call your attention to the memorandum dated August 15, 1949, which is on page 12, lines 12 to 20, dealing with a suggested layout of a long love scene between Ann Sheridan and the leading man, not Douglas and not yet cast. Do you remember the discussion you had about that? A. I do, sir.

Q. Can you relate what that discussion was?

A. We thought it would be a very good magazine layout that would be easily placed in a national or fan magazine, to photograph the love scene from "Carriage Entrance" with Miss Sheridan and the leading man.

Q. And as of that date your department—I refer now to August 15, 1949—you or your department had not yet been informed by anybody as to who the leading man might be?

(Testimony of Perry Lieber.)

A. That is correct. [117]

Q. On the other side of the file we were talking about you had what you call handouts. Can you tell the jury and the court what handouts are?

A. There are several forms of handouts that we supply to the press. There is what we call our spot news, such as castings, new stories purchased, leading men assigned; there are what we call feature stories that we service to the feature sections of the newspapers; there are fashion items; in other words, we try to cover every media we possibly can with material that will publicize our pictures and stars.

Q. And the information that you give out you personally check to see that it is as accurate as possible?

A. Most of it, yes. I don't read all the copy, but most of it I do.

Q. Directing your attention to the first dated item under "Handout" September 16, 1948, do you recall that handout had to do with the type of the so-called independent motion picture deals that were being set up by Mr. Howard Hughes for RKO?

A. I don't recall it offhand.

Q. Will you look at it?

The Court: This is 1948?

Mr. Gang: Yes. I shall lead up to the point.

The Witness: On what page is that?

Mr. Gang: It appears on page 13, line 12, of the deposition, [118] if that helps you find it in your file. According to the deposition it was on the right

(Testimony of Perry Lieber.)

side, on the inside of your file, it was the first dated document under "Handouts."

The Witness: The date was what, Martin?

Mr. Gang: September 16, 1948. Look for the one which mentions "Completion of negotiations of Mr. Hughes with Polan Banks for feature or features starring Ann Sheridan." That is the first item in the file on that subject according to my record. Are you able to find it?

The Witness: No, sir.

Q. (By Mr. Gang): Are you sure you have the same file?

A. I don't think we have the whole file here, Martin.

Q. From looking at your deposition, if you will, I would like you to refresh your recollection as to that particular item so we can get the facts before the jury. I want you to speak from your recollection as refreshed.

A. I recollect it now, yes.

Q. You do remember giving out that handout at about that time?

A. I am not sure of the date, but I do remember the copy.

Q. And you wouldn't say that that date, which was obtained from your file, was not approximately correct, September of '48?

A. No, it should be correct. [119]

Q. About that time you did give out for the studio an official handout about Polan Banks making a picture with Ann Sheridan, which would be an

(Testimony of Perry Lieber.)

independent deal released by RKO; is that correct?

A. As I remember it, that was a part of an over-all story.

Q. Will you look next for the item dated August 2, 1949. In the deposition, to help you find it, it is page 14, line 5, and that has to do with Mr. Margulies, again, and has to do with trades. I assume that meant trade papers like "Variety," is that correct?

A. That is correct.

Q. That is the release dated August 2, 1949, dealing with William Travilla having been assigned by RKO to design Ann Sheridan's wardrobe.

A. What my girl has done is she has left the spot releases out of my file completely. That is what happened, Martin.

Q. We will try to do the best we can without them. I am sure it was unintentional. We will go ahead and do the best we can. If it becomes important we can get them in tomorrow morning. Perhaps it won't be. Particularly if the deposition that you gave refreshes your recollection so that you can testify from your recollection.

A. All right. [120]

Q. Do you remember about August 2nd, 1949, there was a release given out by your office to that effect, to wit, that Mr. Travilla had been assigned by the defendant RKO to design Ann Sheridan's costumes or wardrobe, is that right?

A. Yes, sir.

Q. The next item that I want to question you about has to do with an item given out by your office

(Testimony of Perry Lieber.)

that the picture, "Carriage Entrance," would face the camera about August 15, 1949. You might look at page 14, line 25, for that reference.

A. I remember that, yes.

Q. You do remember giving that out?

A. Yes.

Q. From whom did you get that information, if you remember, Mr. Lieber, when the picture would face the camera?

A. I believe it was from Mr. Sid Rogell.

The Court: When was it given out?

Q. (By Mr. Gang): Can you answer that question, Mr. Lieber?

A. I am just looking to see if the date was here that we released the story. It would appear on the 15th, which would mean it was given out the 14th to appear the following day.

The Court: Of August, given out the 14th to appear the 15th, all right. [121]

Q. (By Mr. Gang): The next item, if you look at the top of page 15, deals with an article given out by your department to the effect that Mr. Parsonnet, the writer, had completed revisions on the script and that it would be under the guidance of Executive Producer Robert Sparks. Does that refresh your recollection about that item?

A. Yes, it does.

Q. That was given out about the same date?

A. That is correct.

Q. You mentioned that these items to the trade

(Testimony of Perry Lieber.)

papers were given out by somebody in your department called a planter, p-l-a-n-t-e-r?

A. That is correct.

Q. That is derived from the fact that he plants the items?

A. He services to trade papers and newspapers.

Q. Mr. Nat James was the planter on "Carriage Entrance"? A. That is correct.

Q. Did the planter have any particular places in which to plant these articles?

A. Yes, indeed. They are designated to what sources they are to be planted. In other words, we try to service all the outlets, the newspapers, as well as the trade papers.

Q. Are there any particular columns which have somewhat special importance with your publicity department in [122] getting items planted?

A. It depends entirely upon the circulation of those items. We try to get the largest circulation we possibly can.

Q. What I meant was would your planter particularly try to get into Harrison Carroll's column or Erskine Johnson?

A. Erskine Johnson, Louella Parsons, Hedda Hopper, Edwin Schallert, right down the line.

Q. There are people who get wider circulation than others, and your effort is to get the widest circulation? A. That is correct.

Q. Look at page 16, which was the third one on it, which states Robert Stevenson will direct the film, and again states that Robert Sparks is the

(Testimony of Perry Lieber.)

executive producer. Do you remember that was issued about the same time as the other one, sometime about the middle of August, is that right?

A. That is correct.

Q. And you state that information was obtained by you from Mr. Sid Rogell?

A. That is correct.

Q. Thus far none of these items has mentioned the name of Polan Banks. Was there any reason for that, Mr. Lieber?

A. No, I do not recollect any reason that Polan's name was left out. In checking further, after giving my [123] deposition I find that I was called by Mr. Ross Hastings and said that there had been an objection to Mr. Banks' name not appearing in the copy, which we rectified immediately.

Q. Subsequently you included Mr. Banks' name?

A. That is right.

Q. If you look at line 19, on page 16, Mr. Lieber, there is an item there, there are two mentioned, one is August 8, 1949, which states that "Melvin Douglas reports to RKO," and the next one is August 12th, 1949, stating that "Ann Sheridan checks onto the RKO Radio lot tomorrow the 16th." Do you remember those releases?

A. I do, yes.

Q. And the 16th there meant August 16th, 1949?

A. That is correct.

Q. If you look on page 17, line 8, at that time in that item released to the trade papers you stated, and I will quote here, "For final fittings on her 21 changes of costume for 'Carriage Entrance' in

(Testimony of Perry Lieber.)

which she will be co-starred with Melvin Douglas. During the week she will also make camera tests of the wardrobe, designed by William Travilla in the 1890 style of New Orleans. Film to be directed by Robert Stevenson, has an August 22 starting date. Robert Sparks is executive producer." Do you remember that, Mr. Lieber? [124]

A. Yes, I do.

Q. That was the handout given at or about the 15th of August by your office?

A. That is correct.

Q. And the information you got was from Mr. Rogell?

A. Correct.

Q. At that time you had not been informed that any leading man had been signed by the defendant for that picture?

A. No, sir.

Q. Again on page 18, line 6, the date is August 15, 1949, which states that Harry Wild has been named cinematographer for "Carriage Entrance," do you remember that?

A. Yes, sir.

Q. You issued that on or about that date?

A. That is correct.

Q. And you also stated that Robert Sparks was the executive producer?

A. Yes, sir.

Q. The next item, if you look at page 18, line 18, is August 15, 1949, also listed "Trades," stating "Largest set to be constructed at RKO Radio in several years is now being built for use in upcoming Ann Sheridan-Melvin Douglas starrer, 'Carriage Entrance,' " and you further go on to state there that "Mr. Stevenson will direct, Polan Banks is

(Testimony of Perry Lieber.)

producer [125] while Robert Sparks is executive producer." That is the item you referred to before as having been cautioned about not mentioning Mr. Banks' name prior thereto?

A. That is correct.

Q. And you gave that statement out at or about that time? A. Correct.

Q. May I direct your attention to a memorandum from Mr. Margulies to you, which is mentioned on page 19, lines 19 to 24. I hope you have that with you. It is the one from you to Mr. Margulies, in which you said, "RKO Radio's 'Carriage Entrance' is described as a drama but it must be a fantasy—the two leading men jilt Ann Sheridan in it." Do you remember that?

A. I would have to get the copy. I haven't got it here, Martin. I can produce it. I would just like to state that all this copy is available. Why it is not here in my file I don't know. It is all available.

The Court: Do you have any recollection of that item counsel asked you about?

The Witness: Offhand I do not, no, sir. When I gave my deposition I had the article right there, your Honor.

The Court: Pass that matter up and bring your file in tomorrow.

Q. (By Mr. Gang): The next item is on page 20, Mr. Lieber, [126] line 7, dated August 16, 1949, also labeled "Trades," which reads as follows: "With RKO Radio's 'Carriage Entrance' rolling toward a start late this month, following assign-

(Testimony of Perry Lieber.)

ments have been made: William Dorfman as assistant director and Al Herman as art director. Robert Stevenson will direct the Ann Sheridan-Melvyn Douglas starrer for Producer Polan Banks, Robert Sparks is executive producer." Do you remember giving that out? A. Yes, I do.

Q. That was given out about the 15th or 16th of August? A. Correct.

Mr. Knupp: Which one, Mr. Lieber, do you know?

The Witness: On the 16th according to my deposition. I would like to point out that this copy is all available and has these dates. At the time of this deposition the copy was available and the date was on the copy.

Q. (By Mr. Gang): On the copy the date was August 16th? A. Correct.

Q. You would therefore state that was the date the article was given out by your department, August 16, 1949? A. Correct.

Q. At that date you had not yet been notified that anybody had been assigned to play the leading male role by the studio? [127] A. No, sir.

Q. There was another item which was mentioned at page 21, line 17, Mr. Lieber, dated September 24, 1948, and it was an article released by you. "Robert Young signed to co-star with Ann Sheridan in Polan Banks' picture 'Carriage Entrance' for RKO Radio release." Do you recall that, Mr. Lieber?

A. I do, yes.

(Testimony of Perry Lieber.)

Q. That was given out by your department about that date? A. That is correct.

Q. And your information that Mr. Young had been signed to co-star was from the front office?

A. From Mr. Rogell, I believe.

Mr. Knupp: Was that with respect to the Polan Banks production?

The Witness: Yes, sir. It is referred to in the copy as the Polan Banks picture.

Q. (By Mr. Gang): You had a file with what you call clippings, did you not?

A. I have that with me.

Q. Fine. You pointed out there were two separate sheets with clippings, is that right, in that file, two separate sheets?

A. There are several clippings.

Q. There is no distinction as between the two sets? [128] A. No.

Q. All right. This is one which I hope you have available. An article, in the left-hand corner of which it says, "Banks to produce own movie at RKO." Under that, under the heading, "Banks to Produce," was an article by Thomas F. Brady of the New York Times dated April 26, 1949; do you have that? If you look at your deposition you will remember that this item was one given out by your department. A. Yes, sir.

Q. I am referring to the one which starts off, "In settlement of Polan Banks' \$670,000 damage suit against RKO the studio purchased Banks' photoplay 'Carriage Entrance,' has taken over his

(Testimony of Perry Lieber.)

commitment with Ann Sheridan to star in it and has engaged Banks to produce the film." Do you find that?

A. It certainly must be here.

Q. April 26, 1949. Have you found it?

A. No, I haven't.

Q. Do you remember the article?

A. I do, yes.

Q. Do you remember the gist of it came from your office at or about that date, April 26, 1949?

A. What page is that on?

Q. Page 23, Mr. Lieber. You might read that whole [129] page because otherwise you might confuse yourself.

A. I am acquainted with it now.

Q. You don't have that particular clipping with you?

A. It may be here. I will get these all marked so I will have them marked for you tomorrow.

Q. We may not need you back here. I hope not. In any event, you do testify from your own recollection that about April 26, 1949, or shortly prior thereto, you gave out information with reference to the assumption by RKO of the "Carriage Entrance" project from Polan Banks?

A. That is correct.

Q. Including the statement that the studio has taken over his commitment with Ann Sheridan to star in it.

A. Correct.

Q. There is an item on that same sheet that says "Robert Young will do lead with Ann Sheridan,"

(Testimony of Perry Lieber.)

and it is marked in ink 7/7/49. Can you find that one in your file?

A. Where is that in the deposition?

Q. Page 23, line 24. I there identified it as the item on the sheet to the right. It is marked in ink 7/7/49. You said that was July 7th, '49. You might look at page 24 at about line 11 in which you testified at that time that you gave that information out.

A. I still am not sure that we gave that story out. You are referring to the one of Mel [130] Ferrer?

The Court: No, no.

Q. (By Mr. Gang): I am talking about the one which said "Robert Young will do lead with Ann Sheridan." A. What page is that on?

Q. Bottom of page 23.

The Court: Do you have any other witnesses after you get through with this witness tonight?

Mr. Gang: No.

The Court: Well, I suggest that we take an adjournment and give Mr. Lieber a chance to go over this file with you and find some of these matters and bring in tomorrow those other matters which he didn't bring today that you think are necessary. If they are matters that you already covered, I don't see any necessity for it.

Mr. Knupp: I suggest that Mr. Gang can give Mr. Lieber a statement now or before he leaves tonight, he can probably get it all together so he won't have to look through it.

Mr. Gang: If Mr. Lieber will go through the

(Testimony of Perry Lieber.)

deposition from where we left off today and get everything that we will need to finish up tomorrow and just pick up the item from the New York Times that we couldn't find, and two of those other items which I don't remember offhand what they were. You can check back and see.

The Court: You passed two matters, so you said. The first item you talked about was some item on August 11, 1949, [131] and the second one was some memorandum from Mr. Lieber to Margulies or Margulies to Lieber.

Mr. Gang: Yes, about the fantasy. Those two I would like to have you bring in, and the clipping from the New York Times, together with the other material from here to the end of the deposition.

The Court: I suggest that you spend some time with him this evening. I suggest you talk to him after court adjourns as to what you want.

Mr. Gang: I will be happy to.

The Court: We will take an adjournment at this time, ladies and gentlemen of the jury. The court admonishes you again of your duty not to converse or otherwise communicate among yourselves or with anyone on any subject touching the merits of this cause on trial. You are not to form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire. Adjourned until 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the court room.)

The Court: Anything further tonight?

Mr. Gang: No.

The Court: 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken from Tuesday, January 30, 1951, until Wednesday, January 31, 1951, at 10:00 o'clock a.m.) [132]

Wednesday, January 31, 1951—10 A.M.

The Court: It is stipulated that the members of the jury are present and in their proper places?

Mr. Jeffers: So stipulated.

Mr. Gang: So stipulated.

The Court: Proceed.

PERRY LIEBER

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified as follows:

Mr. Gang: Mr. Lieber has brought with him this morning the file which was mistakenly left in his office by his secretary yesterday, and I have taken from it, your Honor, after discussion with Mr. Knupp, the documents with reference to which we had some discussion yesterday. In the interest of time and so we will avoid going over a great deal of the material we went over yesterday, I am going to offer as one exhibit the documents which I shall describe by date. I have arranged them in chronological order, and Mr. Knupp and I have agreed, subject to the court's approval, that these will be identified in evidence as one exhibit number. For

(Testimony of Perry Lieber.)

that purpose I therefore offer in evidence now these documents delivered to me by Mr. Lieber from his file. [134]

Mr. Knupp: If the court please, I have not yet seen the documents. I said that I would have no objection to their offer in evidence as one exhibit, but I would like to have them a few minutes to take a look at what Mr. Gang proposes to offer.

Mr. Gang: They are all the documents that we went over at the deposition. Do you want to look at them?

The Court: We will mark them now as Plaintiff's next in order, for identification. Is that 12, Mr. Clerk?

The Clerk: Yes.

(The documents referred to were marked Plaintiff's Exhibit 12 for identification.)

The Court: Do you want to look at them now or at a recess?

Mr. Knupp: I would like to look at them now to see if I should desire to cross-examine with respect to the particular instruments.

(Slight delay in proceedings.)

The Court: Any objection, Mr. Knupp?

Mr. Knupp: None, if the court please.

The Court: No. 12 for identification will be received in evidence, consisting of a series of written documents, memos, press releases, and so forth.

(The documents, heretofore marked Plaintiff's Exhibit 12, for identification, were received in evidence.) [135]

(Testimony of Perry Lieber.)

Mr. Gang: They begin, the first one is dated September 16, 1948; the next is September 24——

The Court: Just a minute. Are you going to read them to the jury?

Mr. Gang: Not at this time, your Honor.

The Court: All right. You are just identifying them by date?

Mr. Gang: Yes.

(Continuing): September 24, 1948; July 25, 1949; August 2, 1949; another August 2, 1949; another August 2, 1949; August 3, 1949; August 4, 1949; August 8, 1949; August 11, 1949; August 12, 1949; August 15, 1949; August 15, 1949; August 15, 1949; August 16, 1949; August 16, 1949; one doesn't belong, so I will give it back to Mr. Knupp.

Direct Examination

(Resumed)

By Mr. Gang:

Q. You have what is left of your file in front of you, do you, Mr. Lieber?

A. I do, yes, sir.

Q. There is no release with reference to "Carriage Entrance" in that file after August 16, 1949?

A. There are items here, yes, the 22nd, 28th, in this file.

Q. What items are those, Mr. Lieber? [136]

A. On the 22nd——

Q. Can you tell us what form it is in? Is it a clipping?

(Testimony of Perry Lieber.)

A. A clipping from the New York Herald Tribune dated——

Q. Was that given out by your office?

A. (Continuing): ——dated August 22nd.

Q. Was it given out by your office?

A. Let me read it here, and make sure.

No, it was not given out by my office.

Q. All you have left now are several cardboard sheets with clippings from newspapers on them, is that right? A. Correct.

Q. There are no releases or handouts or copies of documents given out by you or your department, is that right? A. Correct.

Q. So my statement is correct, then, so far as those items are concerned, August 16, 1949, is the last date? A. That is correct.

Q. May I direct your attention to a clipping there, Mr. Lieber, from the Los Angeles Mirror of July 7, 1949, to the effect that Robert Young will do the lead with Ann Sheridan; do you find it?

A. I do.

Q. Was that given out to the newspapers by the planter? A. It was. [137]

Q. And from whom did you get the information that Mr. Robert Young would do the leading male role with Ann Sheridan?

A. I believe it was from Mr. Rogell.

Q. It was at or about that date?

A. Correct.

Q. Will you direct your attention now to the Louella Parsons column in the Los Angeles Ex-

(Testimony of Perry Lieber.)

aminer of August 19, 1949, Friday of the week of August 15, 1949. Have you found that item?

A. Which one, the Mel Ferrer?

Q. No; the one of August 19th in which reference is made to a statement by a studio spokesman.

A. I believe this is the one, yes.

Q. Do you have that there?

A. I have, yes, sir.

Q. Will you read it, please, referring to "Carriage Entrance"? A. The headline from——

Mr. Knupp: Just a minute, if the court please. This proposed evidence is objected to on the ground it is incompetent and immaterial, on the ground it is hearsay so far as the defendant in this case is concerned, and not binding in any respect on the defendant.

The Court: At the present state of the record the [138] objection will be sustained.

Q. (By Mr. Gang): Mr. Lieber, when did you first learn that Ann Sheridan's contract of employment for "Carriage Entrance" had been terminated by RKO?

A. When I read the article in the paper.

Q. On Friday morning, August 19th?

A. That is correct.

Q. And the article you refer to, without giving its contents, was your first information that RKO had in effect fired Miss Sheridan?

A. That is correct.

Q. You did not get any information on Thursday, the preceding day, August 18th, from anybody

(Testimony of Perry Lieber.)

at the studio about Ann Sheridan, is that correct?

A. No, sir, I did not.

Q. Nor on the preceding Wednesday, August 17th?

A. No, sir.

Q. And you did not give out the information which the article in question purportedly contains?

A. I did not.

Q. You were therefore not the studio spokesman named in that article?

A. That is correct.

Mr. Knupp: Just a minute, if the court please. There is nothing in the record so far with respect to what is in the [139] article. I understand my objection was sustained by the court.

The Court: There is, through the questioning, a general reference that the article indicated she had been fired and discharged or terminated, or something. Is your objection to a particular question now? What is the question pending?

Mr. Knupp: My objection, if the court please, to the question is based upon the fact that it refers to something contained in an article which is not in evidence before the jury.

The Court: Read the question, Mr. Reporter.

(The record was read by the reporter.)

Mr. Knupp: I move to strike the answer, if the court please.

The Court: The answer may go out and the objection will be sustained. I think the evidence heretofore taken in this series of questions makes it clear that this witness had no knowledge of the

(Testimony of Perry Lieber.)

termination or the firing. That is all you wanted to prove, wasn't it?

Mr. Gang: If the court please, I prefer to have the jury know what the article says, to make more sense. You sustained the objection to that. I had to do it backwards.

The Court: I sustained an objection on the ground there was no showing that this defendant or this executive of the defendant issued the story, and in fact your testimony has [140] demonstrated that he didn't issue the story. In fact, he knew nothing about it until he read it.

Mr. Gang: That is the point I want to make, your Honor, which is proving a negative.

The Court: You have already made it. There is no dispute about that.

Mr. Gang: Thank you.

Q. (By Mr. Gang): Did you find out who wrote the article in question with reference to which we have been talking? A. No, sir, I did not.

Q. Did you ever talk to Dorothy Manners,

A. Yes, sir, I have. Pardon me. Did you say who wrote the article, or gave it out?

Q. Who wrote it?

A. I found out who wrote the article.

Q. Who did write the article?

A. Dorothy Manners.

Q. Did you make an effort to find out who gave out the article? A. No, sir, I did not.

Q. You don't know to this date who did?

A. I do not.

(Testimony of Perry Lieber.)

Q. Can you tell us on what day the information contained in the article which appeared in the Examiner on Friday [141] morning, August 19th, had to be given to Miss Manners so that it could appear on that day?

A. Usually it is two days ahead of the publication date. If it was to appear on the 19th, in other words, it would be secured on the 17th. Their deadline is 3:00 p.m. in the afternoon. However, in further checking this story with Miss Manners, she stated that she rewrote the lead on her column after securing the attached story.

The Court: Of course this is hearsay, but nobody objects to it. I don't think it is too material.

Mr. Gang: No objection on my part.

Q. (By Mr. Gang): Go ahead, Mr. Lieber.

A. So the usual deadline rule on this story does not hold. She maintains, Miss Manners, that she received this information around 9:00 or 9:30 p.m. the night, I believe, of the 17th.

Q. Of August? A. That is correct.

Q. When you spoke to her did you ask her who gave her that information? A. I did not.

Mr. Gang: If the court please, I would like to renew at this time the offer in evidence of the article, not for the truth of what appears therein, but so the jury may know that such an article did appear so that the questions asked of the [142] witness will relate to the particular item, without asking the jury to believe that what was said there was true or not.

(Testimony of Perry Lieber.)

The Court: It appears inferentially in the record that the article was an article indicating that Miss Sheridan had been fired or terminated. That is all you want, isn't it?

Mr. Gang: I would want the whole article, because it is attributed to a studio spokesman, and I want the jury to have that before them. Not that it is true.

The Court: At best your offer could only go as far as the court has stated, namely, what the substance of it was. What somebody's comment on it was, arguing it back and forth, and all that sort of thing, would clearly not be competent.

Mr. Gang: My offer is limited only to the fact that on that date that item appeared. Not as to the truth of what is in it.

The Court: That is already in the record, I think, sufficiently for a jury to understand the rest of the testimony. The objection is sustained.

Q. (By Mr. Gang): Is there such a thing as newspaper ethics which prevented you from asking Miss Manners from whom she got the information?

A. There is.

Q. You have known Miss Manners for some time? [143]

A. Many years, yes, sir.

Q. And in your opinion is she an honest and competent newspaper woman?

Mr. Knupp: That is objected to, if the court please, as incompetent. I will stipulate that she is

(Testimony of Perry Lieber.)

an honest and competent newspaper woman. We are not going to bring Miss Manners' reputation into this case, I trust.

The Court: I will sustain the objection. We are getting pretty far afield.

Mr. Gang: I want to ask this witness if a statement attributed to a studio spokesman could be believed if appearing in Miss Manners' column.

The Court: Objection sustained, Mr. Gang.

Q. (By Mr. Gang): Will you look in your clippings, Mr. Lieber, and tell me what the first date is on which you issued any statement about Robert Mitchum appearing in the picture "Carriage Entrance"? I will direct your attention to an item in Harrison Carroll's column dated September 9, 1949.

A. Do you want me to read this?

The Court: The question was what was the date of the first release by the defendant of the name of Robert Mitchum in connection with "Carriage Entrance."

The Witness: The story referred to here was not given out by the studio. [144]

Q. (By Mr. Gang): Did you see the story when it appeared and when you clipped it?

A. Yes, sir.

Q. Did you ascertain whether the item was correct? A. I did.

Q. Was it correct? A. It was.

Q. When did you first learn that the picture was proceeding in production with Ava Gardner

(Testimony of Perry Lieber.)

portraying the leading female role in place of Ann Sheridan?

The Court: Before we go to that, so the record may be clear, when did you first learn that Robert Mitchum was going to play the male lead in "Carriage Entrance"?

The Witness: I am not sure of that date, your Honor, the exact date.

Q. (By Mr. Gang): With reference to September 9th, it will be close enough. How many days before that or after that?

A. I would say it would be right around that period. I can't give a definite date.

The Court: You said you checked something. Was that on or about September 9th?

The Witness: That is the 9th.

The Court: September 9, 1949?

The Witness: That is correct. [145]

The Court: Read the question now about Miss Gardner.

(The question referred to was read by the reporter as follows: "When did you first learn that the picture was proceeding in production with Ava Gardner portraying the leading female role in place of Ann Sheridan?")

The Witness: On or about September 9th.

Q. (By Mr. Gang): Again, Mr. Lieber, how many days prior to September 9th would that information have to be given to Mr. Carroll so as to appear in the newspaper dated September 9th?

(Testimony of Perry Lieber.)

A. The day before, the 8th.

Q. Will you look in your clipping file for the Louella Parsons column in the Los Angeles Examiner of September 12, 1949, relating to a story that Ava Gardner steps into Ann Sheridan's spot in "Carriage Entrance," and gets Robert Mitchum as her leading man? September 12th is the date.

A. Yes, sir, I have that.

Q. Was that information given to Miss Parsons by you or anybody in your department?

A. I don't believe so.

Q. You have no knowledge yourself as to how Miss Parsons got that information?

A. Is it permissible to read the article? It explains itself.

Q. I would like it to be read, but I don't wish to [146] infringe on the patience of the court who has ruled against me twice. I think that is enough. If Mr. Knupp still objects, you cannot read it, because I won't offer it again.

Mr. Knupp: There has been no offer of anything yet, if the court please.

The Court: Mr. Knupp, the witness has inquired whether he may read the article, and you are eloquent by your silence presently. What is your view?

Mr. Knupp: My objection which goes to the prior article which was written in the column by Dorothy Manners is also made with respect to this article which apparently on its face is hearsay. It didn't originate with the studio.

The Court: If there is no showing that it origi-

(Testimony of Perry Lieber.)

nated from the defendant or one of its employees or executives, then the objection is good. The objection will be sustained.

Q. (By Mr. Gang): Would the same thing be true—by that I mean would the same fact be true that you did not issue to Mr. Edwin Schallert any information which appeared in his article in the Los Angeles Times on September 13, 1949, with reference to Mitchum, Gardner, and Melvin Douglas in “Carriage Entrance”?

A. That information could be obtained from the studio, yes.

The Court: The question is did you or did you not issue the information on which the article was based. [147]

The Witness: There was an article issued by the studio, I wish I had that here, on or about that date. These articles that appear here in clippings you can say are rewrites from that original source, from the statement issued by the studio.

Q. (By Mr. Gang): Is there anything in that file to show when you issued your first statement with reference to Mr. Mitchum and Miss Gardner appearing in the picture? I say, again, I don't wish to confuse you. My notes indicate that at your deposition you did have available the release dated September 13, 1949. It is not in that batch and wasn't in the batch you gave me; that is why I asked.

A. Buddy, will you see if you got that in your file?

(Testimony of Perry Lieber.)

(Addressing a person in the audience.)

A Voice: I believe that was in your file, a spot news.

Q. (By Mr. Gang): I didn't list any date beyond August 16th, so it isn't in the batch I handed in. Will you see if it was left in your file?

Mr. Knupp: If the witness testifies that the studio did release something as of that date that Gardner and Mitchum were to appear in the picture, we have no objection to it, then.

The Court: Is that satisfactory?

Mr. Gang: Yes.

The Court: It was on that release of September 13 that certain articles appearing in the papers were based, the facts [148] were based on that release?

The Witness: Yes.

The Court: Which articles were based on that release?

The Witness: The two referred to here, the Parsons story and the Schallert story.

The Court: The Parsons story being the one which I think you said was September 12th?

The Witness: That is correct.

The Court: And the Times article was September 13th?

The Witness: Correct. Our release would have had to take place before that, due to the fact that one of the clippings has already been printed, that is the way it reads here.

(Testimony of Perry Lieber.)

Q. (By Mr. Gang): I don't want to belabor the point, but according to your best recollection, Mr. Lieber, sometime in the neighborhood of September 9, 1949, information either leaked to the press or was given to the press by your department with reference to "Carriage Entrance" being made with Robert Mitchum, Ava Gardner, and Melvin Douglas?

A. A spot news release was given out by the studio approximately that time.

The Court: What do you mean by "that time"? Counsel has said somewhere on or about the 9th of September, or thereafter. When was this release?

The Witness: It would have to be around that time, [149] September 9th or 10th, along in there, sir.

Mr. Gang: Thank you, Mr. Lieber. Cross-examine.

Cross-Examination

By Mr. Knupp:

Q. Your function at the studio, Mr. Lieber, is concerned exclusively with publicity matters?

A. That is correct.

Q. You have nothing to do with contracts which are made by the studio for the services of artists?

A. I do not.

Q. Or directors or anything else?

A. No, sir.

Q. So far as your knowledge of any action which was taken by the executives charged with the

(Testimony of Perry Lieber.)

function of performing those duties is concerned, your only information would come after the action had been taken? A. That is correct.

Mr. Knupp: That is all.

Mr. Gang: No further questions, your Honor.

The Court: You may step down, sir. Thank you.

Mr. Gang: The witness may be excused as far as the plaintiff is concerned.

The Court: May he be excused, Mr. Knupp?

Mr. Knupp: Yes, Mr. Lieber may be excused.

The Court: You may be excused, Mr. Lieber. You can go [150] back and write press releases now.

Mr. Gang: I next call Mr. Schuessler, casting director of RKO.

May the record show, your Honor, that the witness is called under Rule 43(b).

The Court: Under 43(b) of the Rules of Civil Procedure.

FRED SCHUESSLER

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Fred Schuessler.

Direct Examination

By Mr. Gang:

Q. You live in Los Angeles, do you not?

A. Yes, sir.

(Testimony of Fred Schuessler.)

The Court: The jury understands what is meant by calling the witness under 43(b), an executive or officer of the defendant corporation, the same manner in which Mr. Lieber was called. Proceed.

Q. (By Mr. Gang): You have lived here many years, have you, Mr. Schuessler?

A. Twenty-eight years.

Q. How long have you been employed by RKO?

A. Two years.

Q. And in what capacity?

A. Casting director.

Q. Can you state briefly what your functions and duties are as casting director?

A. We read the scripts or the stories as they are purchased by the studio and ready for production, make suggestions and recommendations for the various parts.

Q. Do you do anything beyond making recommendations?

A. After the actor for that particular part is approved we then make a deal with the actor direct or an agent if he has one.

Q. And when actors are employed by other studios, who makes the contact, if I may use that word, with the other studios?

A. The casting office.

Q. In the case of RKO, that means you?

A. Not always. It could be one of the other men in the office, my assistants.

Q. My questions will be directed to the period of time from April 29, 1949, to August 16, 1949,

(Testimony of Fred Schuessler.)

and unless otherwise indicated it will be that period of time with reference to which you are questioned. You have a file in your department, do you not, Mr. Schuessler, in which you keep notes, memoranda, and other documents with reference to [152] particular pictures?

A. Yes, every picture that is made.

Q. And you had such a file with reference to "Carriage Entrance"? A. I have.

Q. You have brought that with you, have you?

A. Yes, sir.

Q. I think you keep notes in there which you make yourself? A. Yes, sir.

Q. With reference to various matters that come up in the making of a picture, is that right?

A. Yes, sir.

Q. Now, what is the first date on which you functioned with reference to "Carriage Entrance"?

A. I don't think I can tell you that.

Q. Well, if you don't remember it, what is the first date that your file shows you functioned on "Carriage Entrance"?

A. I don't think so.

The Court: Is the file in chronological order, or just this way (indicating)?

The Witness: Helter-skelter. There is no date on this first list of suggestions that was made up.

Q. (By Mr. Gang): Before I get into that, in the chain [153] of command in RKO who is your superior, your immediate superior?

A. My immediate superior was Sidney Rogell.

(Testimony of Fred Schuessler.)

Q. And unless otherwise indicated you got your suggestions or discussed them with Mr. Rogell?

A. With Mr. Rogell.

Q. Did you ever talk to Howard Hughes?

A. Oh, yes, sir.

Q. How would that be, in person or by phone?

A. In person and by phone both.

Q. And if you talked to him in person where would you see him?

A. At the Goldwyn Studio in his office, or the aircraft plant if he was engaged in the aircraft business on that particular day, which he is most of the time, or at the hotel where he was residing.

Q. But never at RKO studios?

A. No, sir.

Q. Your first list of suggestions bears no date, you said.

A. No, sir.

Q. Does it refresh your recollection as to any discussion you had with Mr. Rogell about the subject-matter?

A. As to the casting?

Q. Yes. [154]

A. No, sir.

Q. Is that the list you showed me heretofore in which the name of Robert Young appears and which was crossed out?

A. Yes, that is on the budget detail, I take it, is that the one you mean?

Q. May I look at it and see if that is the one I mean?

A. Yes.

Q. Yes, it does have a date.

A. That is July——

Mr. Knupp: Might I suggest this, if the court

(Testimony of Fred Schuessler.)

please? I think Mr. Gang is thoroughly familiar with the file, he has been through it before, it might be of assistance if he had the file before him and selected those items that he wanted to interrogate the witness about.

Mr. Gang: Thank you. That would save me some walking.

The Court: You may do it here or at the witness chair, or at the lectern.

Mr. Gang: I think I would drop my voice if I stand too close.

The Court: Mr. Schuessler, you need not feel bad about that file. There are lots of lawyers who keep them that way.

The Witness: There is too much confusion at the studio [155] to try to keep them in chronological order always.

Q. (By Mr. Gang): The document you handed me is not the one that I had in mind first. I find that it is this yellow sheet of paper which is the one I had reference to.

A. That is the one that bears no date, that is the first sheet we start working on when we make the suggestions.

Q. And this is in your own handwriting?

A. Yes, sir.

Q. And it was made sometime after April 29, 1949?

A. If that is when the script came through, it would be right after the script was received from the script department.

(Testimony of Fred Schuessler.)

The Court: Was the script received before or after the contract was executed with Ann Sheridan? The contract was executed April 29, 1949; do you know when the script came in, before or after that date?

The Witness: No, sir, I do not know.

Q. (By Mr. Gang): It would be your best recollection that you wrote this down sometime after April 29, wouldn't it? A. Yes, sir.

Q. Is it your recollection that all of these names were written down at the same time, or did you add names from time to time?

A. They were added from time to time. [156]

Q. I call your particular attention, Mr. Schuessler, to the writing in ink of "F. Tone," with "r-a-n-c-h-o-t" written in pencil.

A. What was the notation in pencil?

Q. I will show it to you.

The Court: Are you going to offer this document in evidence?

Mr. Gang: Yes, your Honor.

The Court: Let's give it a number for identification.

The Witness: "Franchot," I spelled out his first name.

The Court: This yellow sheet about which there has been some testimony will be marked Plaintiff's 13 for identification.

Mr. Gang: I might offer it in evidence at this time, your Honor, so we need not have it for identification.

(Testimony of Fred Schuessler.)

The Court: All right. In evidence. Then if we refer to it as Exhibit 13 the record will show what we are talking about, rather than this paper, this document, or this yellow sheet.

Mr. Gang: Thank you.

(The document referred to was marked Plaintiff's Exhibit 13, and was received in evidence.)

Q. (By Mr. Gang): With reference to Plaintiff's Exhibit 13 you testified that the name of Franchot Tone was in your [157] handwriting?

A. Yes, sir.

Q. It precedes the name of Robert Young in the column, and the name of Robert Young is crossed out; can you at this time from looking at Plaintiff's Exhibit 13 tell me when you crossed out Robert Young's name?

A. That would be hard to say. That could be any time after I learned that he wasn't going to play the part.

Mr. Gang: With your permission may I ask some questions from this point, your Honor?

The Court: You may. Keep your voice up and the witness will keep his voice up, as well. That is the worst trouble with examining the witness at close range; you tend to whisper to each other.

Q. (By Mr. Gang): In drawing up this list I notice it begins with a man named Brady and seems to proceed more or less alphabetically for part of the way, is that correct?

A. That's right.

(Testimony of Fred Schuessler.)

Q. In fact, the alphabet seems to run down through Robert Young, is that right?

A. Correct.

Q. After Robert Young there are other names entered, such as Richard Conte. Do you remember that occasion? Will you read it, Mr. Schuessler?

A. Do you wish to know the reason for adding these [158] names after Robert Young's, is that it?

Q. If it is helpful, yes.

A. Those names are suggestions that are given to us by the agents or they are suggested to us by articles we might read in the trade papers, or they could be phoned in by the producer, the director, or anybody interested in the picture.

The Court: It is just a preliminary work sheet?

The Witness: That's it.

Q. (By Mr. Gang): I show to you, Mr. Schuessler, on Plaintiff's Exhibit 13 opposite the name of Richard Conte, C-o-n-t-e, the notation "Send script."

A. When I checked on Richard Conte he was under contract to Twentieth Century-Fox, they were not certain that he was available, they had other things in mind, as I recall, for him on their home lot, on his home lot, but it is quite evident that if they would have liked the part in our script he would have been available to us.

Q. First, with reference to Richard Conte, who suggested his name to you?

A. I am not certain about that.

Q. Could it have been Mr. Sparks?

(Testimony of Fred Schuessler.)

A. It could have been.

Q. Or Mr. Rogell?

A. It could have been anyone. It could have been the [159] agent.

The Court: What agent?

The Witness: The agent for Conte. He has an agent, as well as the studios.

The Court: Every actor has to have an agent, does he?

The Witness: They usually have, most of them, yes. 95 per cent of them.

Mr. Knupp: 95 per cent of them have a 10 per cent agent.

Mr. Gang: I detect a note of jealousy in Mr. Knupp's voice.

Q. (By Mr. Gang): Do you remember to whom you spoke at Twentieth Century-Fox with reference to Mr. Conte?

A. Mr. Bill Gordon in the casting office.

Q. It was he who asked you to send over a script?

A. Yes, sir.

Q. You use the word "script" to mean story or screen play in which the actor would appear?

A. Right.

Q. That is for the purpose of having the lending studio consider the part?

A. Correct.

Q. Did you communicate to Mr. Rogell or any other superior at RKO the request of Mr. Gordon? Did you tell anyone that Mr. Gordon at Fox requested a script of "Carriage [160] Entrance" to be sent over to him?

(Testimony of Fred Schuessler.)

A. Yes, sir, I told Mr. Rogell.

Q. Was a script sent? A. No, sir.

Q. Did you inquire of Mr. Rogell again?

A. Not to my knowledge, no, I don't think I did.

Q. So far as Richard Conte was concerned that was the end of it? A. Yes, sir.

Q. I call your attention to the fact that the last name on the list is Charles Boyer, C-h-a-s you have it. Is that your handwriting, too?

A. Yes, sir.

Q. Do you remember when you put that name down?

A. That was the last name added to the list in Mr. Rogell's office.

Q. That was on Tuesday, August 16, 1949, was it not?

A. I really couldn't tell you the date.

Q. But it was a meeting at which Miss Sheridan and Mr. Hickox and Mr. Rogell were present?

A. Right.

Q. Did you do anything about seeing whether Mr. Boyer was available?

A. He was definitely available. I knew that without checking. [161]

Q. Did you check after you left Mr. Rogell's office? A. No, sir.

Q. Did you discuss the possibility of John Lund playing the leading male role in "Carriage Entrance"? A. Very definitely.

Q. And with whom did you discuss it?

(Testimony of Fred Schuessler.)

A. Mr. Hughes, Mr. Rogell.

Q. And in that discussion was anything said about who suggested Mr. Lund? A. No.

Q. What did you do about it?

A. Called the studio, Paramount, where he is under contract, to ascertain his availability, and they said that he was definitely available if we had a good part for him, and if we were interested enough in his services to send a script.

Q. Did you send a script to Paramount?

A. We sent a script.

Q. What happened?

A. Two days later they called us and told us that Mr. Lund was not available.

Q. Did they tell you why?

A. I asked them why and they said because they didn't think the part was worthy of his talents.

Q. And it is your recollection that this was after Mr. [162] Young had turned the part down?

A. Yes.

Q. Why didn't you send a script to Twentieth Century-Fox on Conte?

A. Because we didn't get an approval from the executives on sending it.

The Court: Whose executives?

The Witness: Mr. Rogell in this particular case, or Mr. Hughes.

The Court: In other words, they asked for a script but because you didn't receive authority to send it you didn't mail it?

(Testimony of Fred Schuessler.)

The Witness: That's right. There wasn't sufficient interest in Conte to send a script to Fox.

The Court: Sufficient interest by your superiors?

The Witness: That's right.

Q. (By Mr. Gang): I don't notice Van Heflin's name here, although there was some discussion about Van Heflin. Is there any reason for that absence from this sheet?

A. If it isn't on that sheet it is on one of the others. I know his name was definitely considered.

Q. Let me ask you, did you cross Robert Young's name out? A. Oh, yes, sir.

Q. Did you check with reference to the availability of [163] Franchot Tone?

A. No, I didn't have to check because he was on the lot at the time, and I saw him every day, practically. He had just returned from Paris where he had finished a picture over there and he was finishing the picture on our lot.

Q. Did you discuss with Mr. Hughes the possibility of casting Mr. Tone in the part?

A. No, sir.

Q. Or with Mr. Rogell? A. No, sir.

Q. Did you tell them that his name was on your list as suitable actors for that role?

A. They were subsequently sent a list——

Mr. Knupp: Just a minute, Mr. Gang. That question is objected to in its present form. I don't think there is any evidence yet that this list constitutes people that were considered as suitable

(Testimony of Fred Schuessler.)

actors. They were considered as possible prospects for the role.

The Court: Let's have the question read, Mr. Reporter.

(The question referred to was read by the reporter as follows: "Did you tell them that his name was on your list as suitable actors for that role?")

The Court: The question is a little ambiguous. Whether it means what he said to them or whether it means his interpretation of the list is a question. The objection will be [164] sustained on the ground of ambiguity and uncertainty.

The Witness: Certain actors——

The Court: Just a minute. There is no question pending now.

Mr. Gang: Read the question again.

(The question was reread by the reporter.)

Mr. Gang: I will reframe it.

Q. (By Mr. Gang): Did you discuss with Mr. Rogell the suitability of Mr. Tone for the role?

A. No, sir.

Q. Did you ever show them this list which you had made up with his name on it?

A. I sent them a subsequent list. I don't know whether his name appeared on it or not.

Q. You are referring to a typewritten list, Mr. Schuessler? A. That's it.

Q. Before I question you I will show you this from your file and see if this is the one you mean.

(Testimony of Fred Schuessler.)

A. That's it.

The Court: Is that another document, counsel?

Mr. Gang: Yes, I am going to offer this in evidence as Plaintiff's Exhibit 14.

The Court: Plaintiff's 14 in evidence. [165]

(The document referred to was marked Plaintiff's Exhibit 14, and was received in evidence.)

Q. (By Mr. Gang): Plaintiff's 14 is a photostatic copy, your Honor, of the original typewritten sheet, which you say was prepared in your office, Mr. Schuessler?

A. Yes, sir.

Q. And it relates to the part called Quentin?

A. Right.

Q. Your first notation is "Van Heflin—may be available about 9/1"; that is September 1, 1949?

A. Yes, sir.

Q. Is that as far as you had gone in discussions with reference to Mr. Heflin?

A. That is correct.

Q. Had any discussions been instituted with his studio with reference to borrowing him?

A. Yes, sir, I talked to Mr. Grady in the casting office.

Q. And from him you found out the first available date was September 1, 1949?

A. Right.

Q. Did they ask for a script?

A. No, sir.

Q. Did you ever send one?

A. No, sir. [166]

Q. Do you remember when you prepared this exhibit, Plaintiff's Exhibit 14?

(Testimony of Fred Schuessler.)

A. Do I remember——

Q. When did you type this up, if you remember?

A. There should be a date on it.

Q. The only one is the one that the reporter at the deposition put down, which wouldn't be helpful.

A. I am sorry. We usually put dates on those notes or lists.

Q. Plaintiff's Exhibit 14 has in handwriting opposite three names Nos. 1, 2, and 3, No. 1 being opposite Robert Preston, No. 2 opposite Richard Basehart, No. 3 opposite Robert Ryan; did you put those numbers down, Mr. Schuessler?

A. Yes.

Q. Do you remember when you put the numbers down?

A. I don't know the exact time, but it was after one of my discussions with Mr. Rogell and possibly Mr. Sparks, the producer, and perhaps Mr. Polan, associate producer.

Q. What did those numbers mean to you when you put them down?

A. That was their preference, in that order.

Q. For the part?

A. For the part of Quentin, yes.

Q. At that time did you discuss with them the name of Franchot Tone, which was on this list, Plaintiff's Exhibit 14? [167]

A. No, sir.

Q. Did you discuss with them at that time the name of Mel Ferrer, which is on this list?

A. It is difficult to say, because his name was discussed so many times. Whether we did at this

(Testimony of Fred Schuessler.)

particular time or not I don't know.

Q. You have made available a photostatic copy of a sheet entitled "Budget Detail" from your files.

I will offer this in evidence as Plaintiff's next in order.

The Court: Received in evidence as Plaintiff's Exhibit 15.

Mr. Knupp: May I see it, please?

(Document handed to counsel.)

(The document referred to was marked Plaintiff's Exhibit 15, and was received in evidence.)

Q. (By Mr. Gang): Plaintiff's Exhibit 15 bears the date of July 13, 1949. Can you state whether this was prepared in your office or in the office that prepares the proposed budgets?

A. It was prepared in the budget department of the production office.

Q. Before I question you, I would like you to look at it, Mr. Schuessler. I particularly direct your attention to item No. 13 dealing with the part of Quentin. [168]

A. Yes, sir.

Q. Item No. 1 with reference to the character of Barbara has Ann Sheridan's name opposite it, is that right?

A. Yes.

Q. Item No. 2, the character Paul, has M. Douglas?

A. Yes.

Q. Item No. 3, the character Quentin, the first name written in was Robert Young, is that right?

A. Right.

(Testimony of Fred Schuessler.)

Q. And it was crossed out. Who crossed it out?

A. I did.

Q. And the name of Tone, T-o-n-e, is written in the place of Robert Young?

A. Not in the place of Young. There are two or three other names on there, too.

Q. I will get to those.

A. I am sorry. Yes, it was.

Q. His name is the first name which appears?

A. The first of several names, yes.

Q. And that is your handwriting? A. Yes.

Q. Now, with reference to the time that you crossed out Mr. Young's name and put in Mr. Tone's name, can you give us that time? Bear in mind that Plaintiff's Exhibit 15 bears the date July 13, 1949. [169]

A. It could have been very shortly after this particular date.

Q. It was sometime after July 13, 1949?

A. Yes, sir.

Q. Is your recollection refreshed as to why and how you came to put the name of F. Tone in for the part of Quentin?

A. I ascertained that from the meetings that I had with Mr. Sparks and/or Mr. Rogell, and Mr. Banks.

Q. Can you tell us what they told you?

A. No, I couldn't exactly tell the words any more. They just probably said that they were interested in Franchot Tone.

Q. You did say before that you would not put

(Testimony of Fred Schuessler.)

that in unless instructed by your superiors, is that right? A. The name of Tone?

Q. In this place here.

A. Oh, no, no. I could put that in without any instructions from anyone.

Q. But in this case you did have discussions with Rogell? A. Yes, frequent.

Q. And at this time the name was put in by you after such discussions, is that right?

A. Yes, I am sure it was. [170]

Q. There is also the name "W. C-o-r-y"; would that be Wendell Cory? A. Yes.

Q. Did you write that in? A. Yes.

Q. Did you strike it out? A. Yes.

Q. There is also "Carlson"; is that your handwriting? A. Yes.

Q. There is a "D" and something which I cannot read.

A. That is not unusual. Nobody can read my writing. "D" Niven, that is for David Niven, N-i-v-e-n.

Q. With reference to Mr. Cory, Mr. Carlson and Mr. Niven, did you discuss those names with Mr. Rogell or Mr. Sparks?

A. With one or all of them.

Mr. Gang: It is about 11:00 o'clock, and this is a good time to break for me, your Honor.

The Court: Ladies and gentlemen of the jury, we will take a recess at this time. The court admonishes you of your duty not to converse or otherwise communicate among yourselves or with anyone

(Testimony of Fred Schuessler.)

else upon any subject touching the merits of this cause. You are not to form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire. [171]

We will take a short recess.

(A recess was taken.)

The Court: Stipulated that the jury are present and in their proper places?

Mr. Gang: So stipulated.

The Court: Proceed.

Mr. Gang: Mr. Lieber obtained the release dated September 13, 1949, which was missing earlier, and Mr. Knupp has agreed that we may stipulate that it may be added to and become a part of Plaintiff's Exhibit 12 in proper chronological order.

The Court: All right. What is the date of that release?

Mr. Gang: September 13, 1949.

The Clerk: I have attached it, your Honor.

Q. (By Mr. Gang): During the recess I went through the files and picked out just those items which are of interest here, so we wouldn't have to take up the court's time, and I will go through them in order.

The first is a sheet which bears some handwriting which I understand is that of your assistant Mr. Stockton?

A. That is correct.

Q. And it relates to Ann Sheridan?

A. Right.

Q. And it says, "15 weeks, 7-6" meaning July 6, "until Oct. 18th"? [172]

(Testimony of Fred Schuessler.)

A. That is the starting date, yes, of the 15 weeks, ending October 18th.

Q. In other words, under the contract the 15 weeks of employment which began on July 6th would end on October 18th, 1949?

A. I presume so.

Q. Do you remember what the proposed shooting schedule for the picture was?

A. No, but you will find it on that budget detail.

Mr. Gang: At this time we offer this sheet in evidence, your Honor, as Plaintiff's next in order.

The Court: The sheet about which you just interrogated the witness will be received as Plaintiff's 16. If you mark them first, then your record will show what you are talking about.

(The document referred to was marked Plaintiff's Exhibit 16, and was received in evidence.)

Mr. Knupp: May I ask Mr. Gang what was the date on which that indicated the picture would be completed?

Mr. Gang: October 18, 1949. Is that correct?

The Witness: Mr. Knupp asked the date the picture would be completed. That October 18th date is not exactly the date the picture would be completed. That's the end of the 15-week guarantee, I think, on Miss Sheridan's contract, wouldn't you say? [173]

Mr. Gang: I will accept that.

The Witness: Not having a calendar, offhand I would say that would be it. The picture could be

(Testimony of Fred Schuessler.)

completed two or three or four weeks prior to that time.

Mr. Knupp: Or two or three or four weeks subsequent.

The Witness: That's true, too.

Mr. Gang: Your Honor, all of these documents have been examined by Mr. Knupp, so I won't show them to him first. I shall offer next in evidence a typewritten document consisting of two pages entitled "Cast Carriage Entrance."

The Court: It will be received as Plaintiff's 17.

(The document referred to was marked Plaintiff's Exhibit 17, and was received in evidence.)

Mr. Gang: I won't repeat that all of these are from Mr. Schuessler's file. Your Honor, I would also at this time prior to questioning the witness offer as Exhibit 18, Plaintiff's 18, a document entitled "Important Communication" to Howard Hughes from Fred Schuessler, dated August 4, 1949.

The Court: Received as Plaintiff's 18.

(The document referred to was marked Plaintiff's Exhibit 18, and was received in evidence.)

Mr. Gang: Next in order as Plaintiff's Exhibit 19, dated 8/4/49, which also was obtained from the files of defendant.

The Court: What kind of a document is it—a memo?

Mr. Gang: A photostatic copy of a typed memorandum. [174]

(Testimony of Fred Schuessler.)

A. That is the starting date, yes, of the 15 weeks, ending October 18th.

Q. In other words, under the contract the 15 weeks of employment which began on July 6th would end on October 18th, 1949?

A. I presume so.

Q. Do you remember what the proposed shooting schedule for the picture was?

A. No, but you will find it on that budget detail.

Mr. Gang: At this time we offer this sheet in evidence, your Honor, as Plaintiff's next in order.

The Court: The sheet about which you just interrogated the witness will be received as Plaintiff's 16. If you mark them first, then your record will show what you are talking about.

(The document referred to was marked Plaintiff's Exhibit 16, and was received in evidence.)

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Mr. Gang: October 18, 1949. Is that correct?

The Witness: Mr. Knupp asked the date the picture would be completed. That October 18th date is not exactly the date the picture would be completed. That's the end of the 15-week guarantee, I think, on Miss Sheridan's contract, wouldn't you say? [173]

Mr. Gang: I will accept that.

The Witness: Not having a calendar, offhand I would say that would be it. The picture could be

(Testimony of Fred Schuessler.)

completed two or three or four weeks prior to that time.

Mr. Knupp: Or two or three or four weeks subsequent.

The Witness: That's true, too.

Mr. Gang: Your Honor, all of these documents have been examined by Mr. Knupp, so I won't show them to him first. I shall offer next in evidence a typewritten document consisting of two pages entitled "Cast Carriage Entrance."

The Court: It will be received as Plaintiff's 17.

(The document referred to was marked Plaintiff's Exhibit 17, and was received in evidence.)

Mr. Gang: I won't repeat that all of these are from Mr. Schuessler's file. Your Honor, I would also at this time prior to questioning the witness offer as Exhibit 18, Plaintiff's 18, a document entitled "Important Communication" to Howard Hughes from Fred Schuessler, dated August 4, 1949.

The Court: Received as Plaintiff's 18.

(The document referred to was marked Plaintiff's Exhibit 18, and was received in evidence.)

Mr. Gang: Next in order as Plaintiff's Exhibit 19, dated 8/4/49, which also was obtained from the files of defendant.

The Court: What kind of a document is it—a memo?

Mr. Gang: A photostatic copy of a typed memorandum. [174]

(Testimony of Fred Schuessler.)

The Court: Plaintiff's 19 in evidence.

(The document referred to was marked Plaintiff's Exhibit 19, and was received in evidence.)

Mr. Gang: As Plaintiff's 20 we offer a photostatic copy of a handwritten memorandum entitled "Richard Conte—Carriage Entrance."

The Court: Received as Plaintiff's 20.

(The document referred to was marked Plaintiff's Exhibit 20, and was received in evidence.)

Mr. Gang: As Plaintiff's 21, a copy of an "Important Communication" to Howard Hughes from Fred Schuessler, dated August 3, 1949, that is, 8/3/49.

The only part of interest here and the only part that is offered in evidence is the item reading "Paramount finds the part of 'Quentin' in 'Carriage Entrance' not important enough for John Lund."

That is all it is offered for in this case.

The Clerk: Is that received, your Honor?

The Court: Received as Plaintiff's 21.

(The document referred to was marked Plaintiff's Exhibit 21, and was received in evidence.)

Mr. Gang: I offer as Plaintiff's 22, also an "Important Communication" to Howard Hughes from Fred Schuessler, dated 8/2/49.

The Court: Received as Plaintiff's 22. [175]

(The document referred to was marked Plaintiff's Exhibit 22, and was received in evidence.)

(Testimony of Fred Schuessler.)

The Court: All communications to Mr. Hughes were important communications, were they?

The Witness: Very definitely, or he wouldn't open them.

Q. (By Mr. Gang): In that connection, will you please tell us how you would communicate with Mr. Hughes on these matters? Would you call him on the phone or would you write memos?

A. I would place a phone call for him first, then if I was unable to reach him within a reasonable period of time, I would send him a note. That is the reason for the "Important Communication," and he would undoubtedly call me.

Q. And you put "Important Communication" on top, so it would be called to his attention?

A. Very definitely.

Q. If that wasn't there he wouldn't see it?

A. He would in time, yes. He has an office on Romaine Street through which everything clears.

Q. Where is Romaine Street with reference to RKO Studios?

A. That is where the Hughes Tool Company and Hughes Aircraft and the personnel pertaining to various Hughes enterprises have their general offices. [176]

Q. And your instructions were to send communications to that office?

A. Everything clears through that particular office, and by marking it "Important Communication" that particular office knows that that is im-

(Testimony of Fred Schuessler.)

portant to get to Mr. Hughes and not to lie around on their desk.

Q. Had Mr. Hughes instructed you that these casting problems had to go to him for decision?

A. That is always understood.

Q. He was the final word on who was cast or not cast?

A. Generally.

Q. And in the particular instance we are talking about the answer is yes?

A. In this particular instance I would say so, yes.

Q. Plaintiff's Exhibit 17, the two typewritten sheets, which is headed "Cast—Carriage Entrance," shows under the name "Barbara" Ann Sheridan, under the name "Quentin" no name, and under the name "Paul" Melvyn Douglas, Vincent Price, Zachary Scott, Van Heflin, John Carroll, and Mel Ferrer. Do you remember and can you tell us how you came to draw up Plaintiff's Exhibit 17?

A. You are referring to the names now in that third character?

Q. I am referring to Plaintiff's Exhibit 17. You can look at it and refresh your recollection. [177]

A. This is just a general cast line-up that was sent to the various people interested in the production. Mr. Rogell, Mr. Sparks, Mr. Banks, perhaps Mr. Stevenson, and one or two of the men in my office.

Q. Now, the fact that there is no name opposite the character "Quentin" indicates that this occurred after Mr. Young had bowed out, does it not?

(Testimony of Fred Schuessler.)

A. It could be.

Q. Have you any independent recollection at this time? A. No, sir.

The Court: Let me see the exhibit.

(The document was handed to the court.)

Q. (By Mr. Gang): Can you explain why no names are put opposite the character "Quentin"?

A. I am sorry, I cannot.

Q. Can you remember now that Mr. Heflin and Mr. Mel Ferrer were being considered for the part which subsequently was played by Melvyn Douglas, not for the part of Quentin, is that right?

A. I am not sure that they were considered for the part of Douglas. To my knowledge they were only discussed for the part of Quentin.

Q. Can you explain why their names appear on that exhibit, which I believe is Plaintiff's 17, as suggestions for the part that Melvyn Douglas played? [178]

A. I didn't know they were on there. They are on that same list with the Melvyn Douglas character?

Q. Yes.

A. Then somebody suggested that they might be put on there, I presume.

Q. With reference to plaintiff's Exhibit 18, which is entitled "Important Communication" 8/4/49, that is August, from you to Mr. Hughes, I shall read it to you: "Checked again with MGM on Van Heflin for 'Carriage Entrance' and find that

(Testimony of Fred Schuessler.)

there is a slight chance of his being available after he finishes his present assignment in 'East Side West Side' around September 5. They will determine, after a series of production conferences next week, whether or not he will be available for an outside picture. Have arranged to call Grady one week from today, and should he hear anything before that time, promised to call us." Do you remember dictating that important communication?

A. Yes, sir.

Q. Did you ever hear from Mr. Hughes with reference to its contents, if you remember?

A. I don't.

Q. Plaintiff's Exhibit 19, which is dated 8/4/49 reads: "After a session with Bob Stevenson this morning, we learned that the character of 'Quentin' which everybody has turned down, is being changed into a more intriguing character, and [179] he asked if you would let him have Bob Ryan?"

The Court: Who is it addressed to?

Mr. Gang: To nobody.

The Witness: I can explain that. In writing to Mr. Hughes you will see on one of these other exhibits you have other items pertaining to perhaps two or three different subjects, and the other subjects pertain to other pictures, so when I received replies from him we cut—we separate the notes and file them with their respective pictures. The rest of that sheet is filed with some other picture, no doubt.

Q. (By Mr. Gang): You did, however, dictate this memorandum?

A. Yes, sir.

(Testimony of Fred Schuessler.)

Q. And the language is yours?

A. Yes, sir.

Q. And Bob Stevenson was the man who had been assigned to direct "Carriage Entrance"?

A. Yes, sir.

Q. And when you said "the character of 'Quentin,' which everybody has turned down," you were referring to the script which Mr. Young had declined?

A. Yes, sir.

Q. And do you remember now who the actors were who are included within your word 'everybody'?

A. John Lund—— [180]

Q. How about Wendell Corey?

A. No, because he was working in another picture for us at the time, so it wasn't submitted to him.

Q. Can you remember who everybody was besides John Lund?

A. No, I don't.

Q. You do remember at the time you dictated this, you as the casting director realized you had a problem in finding an actor who would play the role as it was then written?

A. I didn't consider it a problem. With the dearth of leading men we had in the business generally, we were pleased with the good fortune of having two good men under contract, so the character of Quentin never seriously doubted my ability to cast this thing properly.

Q. I didn't hear the last part.

(Testimony of Fred Schuessler.)

A. The character of Quentin never doubted my ability to cast this thing properly.

Q. So far as you can now tell us, August 4, 1949, which is the date of this memorandum, is the first time anybody ever asked you about Robert Ryan for the part of Quentin?

A. No, I am sure he was discussed prior to that, much prior to that, but the enthusiasm for Ryan, my enthusiasm for Ryan in the part seemingly wasn't shared by the rest of the people. [181]

Q. What is the procedure at RKO when the studio assigns an actor to play a role after the discussions have taken place, how do they do it?

A. They notify the actor that he is assigned to play——

Q. Does any written memorandum go down from, I might say, on high, to the departments?

A. No. It is all done by phone.

Q. In other words, if somebody is approved by Mr. Hughes he tells Mr. Rogell by phone?

A. That's correct.

Q. And then Mr. Rogell tells whatever departments are to be informed of that fact?

A. That's correct.

Q. But somebody does make the decision, is that right? A. Very definitely.

Q. And the decision is a decision stating that somebody has been assigned to portray a role?

A. Yes, sir.

Q. And in connection with "Carriage Entrance"

(Testimony of Fred Schuessler.)

the final decision as to who would play a role had to be made by Mr. Hughes?

A. Yes, in conjunction with Mr. Rogell.

Q. You say "in conjunction with"—you mean he would have to tell Mr. Rogell, is that [182] right?

A. Yes. But he had a lot of confidence in Mr. Rogell, and if he recommended someone, why, he usually listened to him, he took that into consideration.

Q. Plaintiff's Exhibit 20, Mr. Schuessler, had no date, but it is in your handwriting, I believe. It reads "Richard Conte, 'Carriage Entrance.' Send script when S. R. gets H. H. approval." Do you remember the document? A. Yes.

Q. And "S. R." means Sid Rogell?

A. Right.

Q. And "H. H." means Howard Hughes?

A. Right.

Q. And the notation was that you couldn't send the script to Fox until Mr. Rogell got Mr. Hughes' approval? A. That's correct.

Q. And you never got word that such approval had been granted? A. I did not.

Q. Plaintiff's Exhibit 21 is dated 8/3/49, and also is entitled "Important Communication to Howard Hughes from Fred Schuessler." I think I have read that part before, your Honor, and I won't read it again, about John Lund, except to ask you if you dictated that memorandum of Plaintiff's Exhibit 21? A. That's right. [183]

(Testimony of Fred Schuessler.)

Q. The last is Plaintiff's Exhibit 22, also entitled, "Important Communication to Howard Hughes from Fred Schuessler," dated 8/2/49, and it reads, "Kirk Douglas' finishing date will be three or four weeks away instead of two as represented by the agent. Furthermore, Warners' advises they undoubtedly will exercise their preemptive rights to his services for 'Glass Menagerie,' to start soon after his present assignment. Paramount are now reading 'Carriage Entrance' script for John Lund and will advise if they are interested. They unhesitatingly declared, however, that they would not be interested in 'Come Share My Love' for him. Any interest in Cornel Wilde or Richard Basehart for 'Carriage Entrance' "?

Do you remember dictating that memorandum?

A. Yes, sir.

Q. And sending it to Mr. Hughes?

A. Yes, sir.

Q. Do you have any recollection of the receipt of any word from Mr. Hughes with reference thereto?

A. No, sir.

Q. I will ask you, Mr. Schuessler, to look in your file for your copy of that budget detail and tell me how many weeks of shooting schedule there was for "Carriage Entrance" with Ann Sheridan?

A. You have it here as an exhibit.

Q. The copy of it in the file. If there isn't, we [184] will get the other one. I might as well show you Plaintiff's Exhibit 15. I think you have an exact copy.

(Testimony of Fred Schuessler.)

A. No. This one was dated September 6th. October 6th, rather.

Q. Hold that, too. Will you tell us from Plaintiff's Exhibit 15, I believe, what the projected shooting schedule for "Carriage Entrance" was in July of 1949? A. Five weeks.

Q. In other words, that is six days per week, 30 shooting days? A. Right.

Q. Will you explain to the court and the jury what you are talking about when you say shooting schedules?

A. A shooting schedule is made up by the production office showing the scenes that are to be shot each day. Anything more?

Q. When you say "five weeks," that means the experts in that department have estimated that the picture as contemplated can be photographed in that period of time? A. That's correct.

Q. So if you had October 18th, 1949, as the last day of the 15-week period of Miss Sheridan's employment contract, as you have testified, if you counted back five weeks from that day the picture could theoretically have started at any time up to that date and finished within the 15-week [185] period? A. Yes, sir.

Q. The picture "Carriage Entrance" was made by RKO, was it not? A. Yes, sir.

Q. And it started shooting sometime in the month of September, 1949?

A. I don't know the dates.

Q. It has been stipulated it began towards the

(Testimony of Fred Schuessler.)

end of September, and finished early in November of 1949.

I believe the exact date is September 26th, Mr. Knupp, if I am not mistaken.

Mr. Knupp: The date it was finished?

Mr. Gang: No, the day it started.

Mr. Knupp: It started on September 26th and finished on November 1st.

Mr. Gang: Yes. I will accept those dates. Are those the correct dates?

Mr. Knupp: That is as I recall the dates, Mr. Gang.

Mr. Gang: The stipulation is a little different. I think we had better stick to the stipulation. I think certain work began, rehearsals and tests, but the stipulation you gave me, which I have accepted, is that principal photography, which is what we are talking about here, began on October 3, 1949, and was completed November 16, 1949.

Q. (By Mr. Gang): In other words, with those dates, the [186] picture as actually photographed was within a five-week period?

A. That's right.

Q. Was your office consulted with reference to casting Mr. Mitchum in the role of Quentin?

A. No, sir.

Q. Who did that?

A. I couldn't answer that.

Q. Nobody told you? A. No, sir.

Q. Who cast Ava Gardner to play the role that Ann Sheridan had been employed for?

(Testimony of Fred Schuessler.)

A. I couldn't answer that.

Q. Nobody told you that? A. No, sir.

Mr. Gang: That is all, Mr. Schuessler.

The Court: Cross-examine.

Mr. Knupp: Mr. Schuessler is being examined as an adverse witness. We have no desire to cross-examine at this time. We understand that we reserve the right to call him and ask him any questions with respect to not only new matters, but also with respect to any matters which have been gone into on cross-examination.

The Court: That is correct. You may step down.

Mr. Gang: Mr. Youngman. [187]

GORDON E. YOUNGMAN

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Gordon E. Youngman.

The Court: This witness is also called under Rule 43(b) of the Rules of Civil Procedure?

Mr. Gang: Yes, your Honor, although there is a slight difference. Mr. Youngman is not now employed by the defendant. He was during all the time herein material.

The Court: The rule applies, though?

Mr. Gang: Yes.

(Testimony of Gordon E. Youngman.)

Direct Examination

By Mr. Gang:

Q. You are a resident of California, Mr. Youngman? A. Yes, sir.

Q. And during the period of time we are here concerned with from April 29, 1949, to August 17, 1949, and beyond, you were an employee of the defendant RKO? A. Yes, sir.

Q. You were a resident vice-president?

A. Yes.

Q. And your job was administration of contracts, more or less? [188]

A. That was part of it, yes.

Q. You are by profession a lawyer, are you not?

A. I am.

Q. And you are now again practicing in that profession? A. I am again practicing.

Q. From the time that the contract of April 29th was signed by RKO with Miss Sheridan, matters having to do with amendments of the contract or consents were within your jurisdiction?

A. Yes, they were handled by my department.

Q. I won't take up the time of the court to go through the exhibits which were signed by you in that capacity, but I would like to question you briefly with reference to certain items to clarify them.

The first document, Mr. Youngman, is Plaintiff's Exhibit 7 in June of 1949, and it refers to an agreement on the part of the studio and Miss Sheridan

(Testimony of Gordon E. Youngman.)

requested by you delaying the date on which you were to deliver the final budget up to July 25, 1949. Do you remember the occasion?

A. No, I don't.

Q. Well, the contract provided under Article 7 that you had to deliver a copy of the list of deferments and the final budget by a certain date.

A. Oh, yes, yes.

Q. And you requested that Miss Sheridan consent to [189] postponing that date?

A. That is correct. The reason I didn't remember at first is because I didn't prepare any of these instruments; I just signed them.

Q. The reason I asked you is because your signature is on it.

Plaintiff's Exhibit 8 is dated July 8, 1949, and again is a letter signed by you in which you requested and secured the consent of Miss Sheridan to casting Mr. Melvyn Douglas in "Carriage Entrance" and getting her agreement to giving him co-star billing in third position. Do you recall that under the contract you required her consent?

A. Yes, I remember that Ross Hastings, one of my assistants, had that discussion with Miss Sheridan's manager and brought the letter up for me to sign.

Q. Under date of July 25th, Plaintiff's Exhibit 10 is another agreement under Article 7 postponing the date on which you were required to deliver the list of deferments and the final budget to August 15, 1949. Do you remember that occasion?

(Testimony of Gordon E. Youngman.)

A. Yes, I do.

Q. Under date of August 13, Plaintiff's Exhibit 11 was the one in which you did supply the list of deferments and the budget? A. Yes. [190]

Q. I direct your attention to Tuesday, August 16, 1949. Your office at that time was on the same floor of the building, RKO Studios, as that which Mr. Sidney Rogell's office was? A. Yes, sir.

Q. Do you remember the afternoon of that day and a visit from Miss Sheridan accompany by Mr. Hickox? A. Yes, I do.

Q. There was no previous appointment for that meeting, was there, Mr. Youngman?

A. No, sir, they just dropped in and asked if they could see me.

Q. Do you remember the occasion as to how it occurred, who came in first, or did your secretary announce them?

A. My secretary called and said, "Miss Sheridan and Mr. Hickox would like to see you," and I said, "Ask them to come in."

Q. Up to that time you had never met Miss Sheridan? A. No, I never met her before.

Q. And Mr. Hickox introduced you to her?

A. That is right.

Q. Did you have a conversation at that time?

A. Yes, we did.

Q. Can you repeat the substance of what was said and by whom? [191]

A. Mr. Hickox did most of the talking, as I

(Testimony of Gordon E. Youngman.)

recall it. He sort of outlined the history of the deal——

Q. If you don't mind, and I hate to say this to another lawyer, would you rather say what he said, in substance, instead of giving your description of it?

A. All right. He said that she had made a contract with Mr. Banks and RKO had taken it over, as I knew, and she had had approvals under the contract of the leading man; that Robert Young had refused to approve it, and various submissions had been made to her. He mentioned Robert Ryan, Richard Basehart, Mel Ferrer, and Robert Preston, and that Miss Sheridan had not approved any of them. He said that it didn't look as if the picture were going to be made and he would like to know what the studio's position was regarding it. So I said that casting was not in my line, that I really had nothing to do with it, that I would have to look into the matter.

Q. Was anything said about the various people that Miss Sheridan had suggested that she did think would be suitable for the part?

A. Yes, Miss Sheridan said that she was willing to accept Franchot Tone, and she also said that Mr. Rogell was trying to see if Charles Boyer would be available.

Q. Was something said about John Lund?

A. John Lund, I don't believe he was mentioned. [192]

(Testimony of Gordon E. Youngman.)

Q. You wouldn't say that his name wasn't mentioned? A. No, I wouldn't.

Q. How about Richard Conte?

A. No, I am sure he wasn't mentioned.

Q. How about Robert Mitchum?

A. I don't recall his name being mentioned.

Q. Did Miss Sheridan or Mr. Hickox ask you to intercede with Mr. Hughes to get him to make a decision about an actor for that role?

A. I don't recall it being put that way. I think they asked me to find out for them what the studio's position was going to be, or what was going to happen. I don't recall being asked to intercede with Mr. Hughes.

Q. Isn't it fair to state that they came to see you to ask you to get some action?

A. That's right.

Q. And that is what they wanted you to do?

A. Yes.

Q. Even though casting wasn't your problem?

A. Yes.

Q. It is fair to state, isn't it, that Mr. Hickox and Miss Sheridan said that they had been trying to get together on a leading man for weeks?

A. No, I don't remember that being said. They told me the leading men that had been presented to them, and Miss [193] Sheridan said that she wanted someone with more of a name than these four, and she was willing to take Mr. Tone and would be willing to take Mr. Boyer if Mr. Rogell could arrange it.

(Testimony of Gordon E. Youngman.)

Q. Did you ask if she would take Mr. Boyer?

A. She told me.

Q. At that time did Miss Sheridan say she wanted to make the picture, on Tuesday, August 16th?

A. No, she didn't. As a matter of fact, Mr. Hickox said that it looked as if the picture were not going to be made.

Q. Did he say why?

A. Because they couldn't get the casting.

Q. And the purpose of the meeting with you, was it not, as they stated to you, was for you to intercede to get the part cast so that the picture could be made?

A. They didn't say that was the purpose.

Q. Didn't you infer that from the visit?

A. I didn't infer a great deal from the visit, Mr. Gang. It lasted about 10 minutes, and I said I would have to look into the facts. I had no previous knowledge of the arguments at all, and I was completely green on this subject. They had dropped in unexpectedly, I had no previous preparation for their visit, I wasn't familiar with the details of what had been going on before, and all I did was listen to [194] them and say that I would look into the matter and see what the situation was and what could be done.

Q. Isn't it a fact that they asked you to help?

A. Yes.

Q. That is why they came to see you?

A. That's right..

(Testimony of Gordon E. Youngman.)

Q. And after you had that visit with them did you talk to anybody? A. Yes, I did.

Q. You told whom that they had come to see you asking your help?

A. I first talked to Polan Banks, the producer of the picture.

Q. Did you talk to anybody with authority in the studio, like Mr. Hughes?

A. After I talked to various other people, yes.

Q. And after you talked to Mr. Hughes you consulted with your legal counsel? A. Yes.

Q. Both at the studio and outside the studio?

A. Well, Mr. Mendel Silberberg from outside the studio.

Q. And the resident lawyers at the studio?

A. Yes, Mr. Lipsitch, his partner, came in there.

Q. And in consulting with them you told them Miss Sheridan had come to see you Tuesday afternoon? [195] A. That's right.

Q. You related in detail the request that had been made to you at that time? A. Yes.

Q. And after relating that request and conversation to Mr. Silberberg and the legal department, what was done, Mr. Youngman?

A. After that particular conference—there had been a number of other conferences with other people in between——

Q. My question was what was done, Mr. Youngman.

A. A letter was sent. It was prepared by Mr. Lipsitch and sent to Miss Sheridan.

(Testimony of Gordon E. Youngman.)

Q. The document which I show you is dated August 17, 1949, signed by RKO by Gordon E. Youngman. I ask you if that is the document to which you have just referred? A. Yes, sir.

Q. That has been referred to as a letter of termination or discharge. You say that was prepared by Mr. Lipsitch of the studio legal department?

A. Of Mr. Silberberg's firm.

Q. And that was a result of several conferences or meetings, is that right? A. Yes, sir.

Q. Which began on Tuesday, the 16th of August, and continued until the late afternoon of Wednesday, the 17th of August? [196] A. Yes, sir.

Q. And there were several drafts, were there, before the document you have before you was sent out?

A. I don't recall. I think there may have been one previous draft. Mr. Lipsitch left the meeting, went downstairs for about 20 minutes or so, and came back with the letter which Mr. Silberberg, Mr. Rogell, and I, read. We may have changed a few words in it, I don't know.

Q. In any of these conferences did anybody suggest designating an actor to portray the leading male role, informing Miss Sheridan of the designation and asking her to approve or disapprove?

A. No.

Q. Did anybody suggest giving Miss Sheridan a chance to decide whether she wanted to make the picture with the person finally selected by you or not? A. Not in those conferences, no.

(Testimony of Gordon E. Youngman.)

Q. No discussion of that at all?

A. No, sir.

Mr. Gang: That is all, Mr. Youngman. Just a moment. Mr. Rudin calls my attention to something.

Q. (By Mr. Gang): You were vice-president all the time mentioned, didn't you so testify?

A. Yes, sir.

Mr. Gang: That's all. [197]

Mr. Knupp: With respect to this witness, if the court please, the same observation I made with respect to the prior witness is true. We desire not to cross-examine the witness, because he is called as an adverse witness. We expect to recall him as our own witness.

The Court: That is satisfactory. You may step down, Mr. Youngman.

Mr. Knupp: I suppose Mr. Youngman may be excused at this time?

The Court: He may be excused subject to your own arrangement with him, Mr. Knupp.

Mr. Gang: Your Honor, I am going to call next Mr. Polan Banks.

I would like to state that Mr. Hickox—I have not had him in the court room as his testimony would be purely corroborative. If Mr. Knupp wants him at any time, he is available.

Mr. Knupp: If the court please, we are not going to call Miss Sheridan's business manager to corroborate the testimony the plaintiff's witnesses have given on the stand. If Mr. Gang wants to put

Mr. Hickox on the stand, it is his duty to put him on, not to suggest to me that I put him on.

Mr. Gang: I don't want any discussion on it. I just made the statement.

The Court: Just a moment. The jury will disregard the [198] argument of counsel, it is not evidence in this case, and you will not base your decision on any argument, but upon the facts as you receive them in evidence, or the documents that are received, or the stipulations of the parties.

POLAN BANKS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Polan Banks.

Direct Examination

By Mr. Gang:

Q. State your residence, Mr. Banks.

A. Los Angeles, California; Beverly Hills, California.

Q. And your profession?

A. I am a writer-producer.

Q. And you have written several novels, have you not, Mr. Banks? A. Ten.

Q. And one of the ten was "Carriage Entrance"? A. Yes, sir.

Q. You proposed to make a picture based upon "Carriage Entrance"? A. Yes, sir.

(Testimony of Polan Banks.)

The Court: You have made it, haven't [199] you?

The Witness: Yes, sir. I stand corrected.

Q. (By Mr. Gang): It is in the record that you had a contract with RKO under which your corporation would produce the picture for distribution and release by RKO? A. Yes, sir.

Q. It is also in the record that litigation arose out of a claimed breach of contract on the part of RKO? A. Yes, sir.

Q. And that litigation was settled by your making a contract under which RKO acquired the property from you and took over your commitment with Ann Sheridan? A. Yes, sir.

Q. And in that transaction you were employed to act as what, Mr. Banks?

A. As producer of the picture, as sole producer of the picture.

Q. You were employed to act as what?

A. I was employed to act as sole producer of the picture with the addition of an executive producer put on the picture by the studio.

Q. Can you state what the functions of a producer are?

A. Well, to the best of my knowledge it is to pick the story, work on the script or with the writer on the script, help cast, and see it through production in general, through physical production. [200]

Q. At the time of the transaction in April of 1949, had you prior thereto discussed with Mr.

(Testimony of Polan Banks.)

Young or Mr. Goldstone, his agent, Mr. Young working as the leading male actor in the picture?

A. Yes.

Mr. Knupp: If the court please, that is objected to as incompetent and immaterial; conversations had by Mr. Banks at a time when he had no connection with the defendant in this action are hearsay and not binding upon the defendant in the action.

Mr. Gang: I will withdraw the question. It was preliminary, your Honor, but I will withdraw it.

The Court: Very well.

Q. (By Mr. Gang): At the time you made the deal with RKO did you tell them that Robert Young had agreed to play the leading male role in the picture? A. Yes, sir.

Q. And that was a fact at that time?

A. Yes, sir.

Q. And when the deal was made on April 29, 1949, that was one of the considerations which led to the making of the deal, is that right?

A. To the best of my knowledge.

Q. And that Miss Sheridan had approved Robert Young was also one of the conditions? [201]

A. Yes, sir.

Q. And she had approved one of three men to direct the picture also? A. Yes, sir.

Q. And also she had approved the story?

A. Yes, sir.

Q. And the settlement wasn't completed until all of those items had been agreed to?

(Testimony of Polan Banks.)

A. Do you mean the settlement with the studio?

Q. With RKO, yes. A. Yes.

Q. You stated that there was to be an executive producer. Will you tell the court and jury what that means?

A. I understand that it is general practice, as far as I know, it is general practice on all RKO pictures to have an executive producer on every major picture. I believe some of the other studios have the same practice and some do not.

Q. What does he do?

A. Well, he supervises the producer in general policy, and really acts as liaison with the front office. In other words, as far as the producer is concerned, as far as I am concerned, he represents the studio.

Q. In other words, he was in the chain of command between you and Mr. Rogell and Mr. Hughes?

A. Exactly. [202]

Q. What happened after April 29, 1949, with reference to the screen play which is described in the contract?

A. Well, the studio didn't like the screen play that they had purchased and they put on another writer to make changes, to make a complete rewrite, in fact.

Q. The name of that writer was Marion Parsonnet?

A. Yes.

Q. He was a man, was he not?

A. Yes, a very fine write, incidentally.

(Testimony of Polan Banks.)

Mr. Knupp: I didn't get the last part of the answer.

(The answer was read by the reporter.)

Q. (By Mr. Gang): And did you participate with him in discussions of his revision as it went along? A. Yes, I did.

Q. Where did those discussions take place?

A. In my office and at his home at Malibu Beach, and occasionally in Mr. Sparks' office.

Q. At RKO? A. At RKO.

Q. What is the first occasion that you remember on which Miss Sheridan came to RKO after April 29, 1949?

A. The first occasion, I believe was when she paid—was invited to come to the studio, and Mr. Rogell arranged a luncheon for her, which was attended by Mr. Rogell, Mr. Sparks, I believe, Mr. Stevenson, Mr. Lieber, and Mr. Hickox [203] and myself.

The Court: Were you here when Miss Sheridan testified?

The Witness: Yesterday morning, sir? No, sir. I came at 2:00 o'clock.

The Court: I was going to ask if this was the red carpet luncheon.

The Witness: Yes, it was. There were flowers on the table and all that sort of thing.

Q. (By Mr. Gang): You did mention lunch, I think, didn't you? This is a good time.

The Court: Yes, it is a timely topic.

Mr. Knupp: That was in addition to the flowers, I suppose.

The Court: Ladies and gentlemen of the jury, we will take our adjournment until 2:00 o'clock. Remember the admonition of the court not to converse or otherwise communicate among yourselves or with anyone about any subject touching the merits of this cause on trial. Do not form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire.

(Whereupon at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [204]

Wednesday, January 31, 1951—2:00 P.M.

(The following proceedings were had in the absence of the jury:)

Mr. Gang: May it please the court, Mr. Rudin would like to present a motion at this time on behalf of plaintiff.

The Court: Is it stipulated the jury is absent?

Mr. Gang: So stipulated.

Mr. Knupp: Yes, your Honor.

Mr. Rudin: Your Honor, at the pretrial conference we discussed the question of our attempts to serve Mr. Howard Hughes, the managing director of production of the defendant. I was wondering if Mr. Knupp would stipulate that a subpoena was placed in the hands of the United States Marshal with instructions to serve Mr. Hughes on

or about January 9th of this month, and that the marshal made reasonable efforts to serve Mr. Hughes, but was unable to do so, including calling Mr. Ross Hastings of defendant, an officer of defendant or employee of the defendant, to arrange for service on Mr. Hughes; that although the marshal was informed that an attempt would be made to arrange for an appointment to serve Mr. Hughes, no such appointment was ever made and the marshal was unable to effect service on Mr. Hughes.

The Court: Pardon me just a minute.

(Slight delay in proceedings.) [205]

The Court: Go ahead.

Mr. Rudin: In addition, the plaintiff employed a firm which specializes in making difficult services, who sent out many employees in an attempt to find Mr. Hughes, who watched his apartment, went to the Goldwyn lot, went to other places where Mr. Hughes purportedly maintains offices, and was unable to serve Mr. Hughes; talked to people purportedly employed by Mr. Hughes who said that he should call the office to make an appointment to see Mr. Hughes, and upon calling Mr. Hughes' office was informed that Mr. Hughes was out of town.

We can present evidence on this if Mr. Knupp desires. He indicated perhaps he would stipulate that the plaintiff made every reasonable effort to serve Mr. Hughes but was unable to do so, and that Mr. Hughes is within the jurisdiction of the court.

Would you so stipulate to that effect, Mr. Knupp?

Mr. Knupp: If the court please, in the first place I think the evidence is entirely incompetent and immaterial for any purpose in this case, and upon that ground if evidence to the effect indicated by Mr. Rudin were offered we would object to it.

So far as the actual proof of any facts which he has related is concerned, I would agree that either Mr. Gang or Mr. Rudin would testify as to the attempts which they had made or which they had caused to be made to secure service. [206] I wouldn't consider it necessary that they should produce either themselves or any of the officers whom they say they secured to attempt the service.

I respectfully submit that the testimony is in no respect material or competent in this case. I would think, if the court please, the question of whether or not Mr. Hughes appeared in the case is something—that the effect of it is something which the court could determine as a matter of law.

Mr. Rudin: We asked Mr. Knupp to stipulate to that for several reasons. We would like the record to be clear that Mr. Knupp has been given an opportunity to produce Mr. Hughes, because we intend to ask the judge to instruct the jury that there is a presumption from Mr. Hughes' failure to appear and testify, that the presumption is that if he did appear and testify that his testimony would be adverse to the defendant on any of the issues in the case, and that counsel for plaintiff in closing argument to the jury can comment on the absence of Mr. Hughes and the failure of Mr. Hughes to come forth and testify at the trial.

We refer your Honor to two Supreme Court cases, *Mammoth Oil v. U. S.*, 275 U. S. 13, and to *Kirby v. Tallmadge*, 160 U. S., 379.

There is a California case on the matter, *Buswell v. City and County of San Francisco*, 89 Cal. App. 2d, 123. [207]

There are numerous federal cases and Circuit Court of Appeals decisions on this presumption. Would your Honor like some more authority on that proposition, that an inference does arise from the failure to produce a witness or testimony, that it can be commented upon by counsel, and an instruction can be given to the jury as to the presumption that the testimony or the evidence would be adverse to the party failing to produce that testimony or that witness?

We would also like to make a motion that the court issue——

The Court: What is your first motion? Have you made a motion so far?

Mr. Rudin: Our motion would be this, that the court issue its order requiring Mr. Hughes to appear and testify.

We make that motion based upon Rule 43(b) of the Federal Rules of Civil Procedure, which provides that a party may interrogate any unwilling or hostile witness by leading questions. It goes on with the general adverse witness rule. And upon the further ground that Mr. Hughes is an officer of the defendant, that the defendant is here in court, that the court has inherent power in con-

nection with a party before it to order that party to appear and testify.

We make the further motion—not so much a motion, but it is both a motion and request—that the defendant produce Mr. Hughes, and the court so instruct the defendant, to preserve our right and clarify our right at the conclusion of [208] the case to comment upon Mr. Hughes' absence and to request an instruction from the court to the jury as to the presumption that arises from Mr. Hughes' failure to appear as a witness.

The Court: Just a moment now.

Mr. Knupp: So far as the motion itself——

The Court: Just a moment, if you please.

Mr. Knupp: I thought you asked for my comment.

The Court: Not yet, Mr. Knupp. I was just checking the civil rules to see if there was anything directly in point in the matter.

Proceed now, Mr. Knupp.

Mr. Knupp: So far as the defendant is concerned, if the court please, there never has been any indication on our part that we doubted the right of the plaintiff to comment in this case on the failure of any witness to appear who does not appear. I have never understood that there was any question. I would assume that if it was apparently within the power of a party to produce a witness, and he did not produce the witness, that that fact is a matter of legitimate comment or argument to the jury. But that, I think, is as far as the matter goes.

There is no proceeding that I know of by which the presence of a witness can be compelled, except by subpoena, and if the parties have made an effort to secure the presence [209] of the witness by subpoena and have been unable to do so, and particularly in a case in which the witness is an officer of the corporation, then, as I say, I have no doubt that that is a matter of legitimate argument to the jury. But that, it seems to me, is as far as the matter goes.

So far as an instruction by the court is concerned, I suppose with respect to matters with which the witness might be shown by other evidence in the case to be familiar, and with respect to which there was a dispute between the parties as to what the facts were, the court might legitimately instruct that in those respects there would be a presumption that the evidence if produced would be adverse. But that, it seems to me, is the limit to which the law permits the court to go or which should be permitted.

Mr. Rudin: Your Honor, on that point I would like to reply briefly by pointing out that there is a Ninth Circuit case, *Collins v. Wayland*, 139 Fed. 2d, 677. The *Collins* case involved a failure to appear for a deposition without a subpoena, and the court struck the pleadings of the parties.

There seems to be some rather direct authority for that in Rule 39. I don't want to give the court the impression——

The Court: 37, I think you mean.

Mr. Rudin: 37, yes. Whether the same authority

exists in the court inherently as to appearance at a trial, it would seem to follow, although we submit there is nothing specifically [210] in the FRCP, as your Honor has just checked. However, although the court—in view of the fact that Mr. Hughes is not an actual defendant, but merely an officer, although the court might not have the power to punish Mr. Hughes for contempt, it can take action within the proceedings, such as striking pleadings, or the defenses or counter-claim, whatever it might in its discretion feel was a proper imposition of a penalty upon a party within the jurisdiction of the court who refuses to obey the order of the court to appear. As I say, there is no other direct authority that I have been able to find on the question of appearing in court.

As to Mr. Knupp's statement that anyone can comment on the failure of a witness to testify, as I read the cases the rule seems to be that comment can only be made if the witness was unavailable to the party making the comment and available to the other party.

The Court: He has conceded that point. I take it from now on that as far as that is concerned if Mr. Hughes isn't produced he has conceded that you may comment to the jury, and that his testimony would probably be adverse if he hasn't been produced.

Mr. Rudin: We wanted to make the point that he wasn't available to us.

The Court: This was raised at pretrial and no

one has presented any law on it, and I asked counsel to present some [211] law on it. You presented me some cases by way of citation, but I have no memorandum on it, and I don't intend to take up the time of the jury conducting a research at this time. Let me see where we are on the matter.

You have made a motion that the court make its order directing the defendant to produce Mr. Hughes.

Mr. Rudin: That is correct.

The Court: That is one motion.

What penalty do you think lies if the court makes that order and Mr. Hughes is not produced?

Mr. Rudin: I think the court might have the power to strike the defendant's pleadings from the action.

The Court: What was your second motion now?

Mr. Rudin: Our second motion was mainly a motion for the court to make the order to the defendant to produce Mr. Hughes, to clarify our position.

The Court: That is your first motion.

Mr. Rudin: The second motion was in connection with the right to make a demand. It was sort of a notice to produce, conditioned upon the fact that if they failed to produce him we would then expect to have the right to comment upon that failure.

The Court: I thought you said something about instruction of the court.

Mr. Rudin: We would then request a proper instruction [212] from the court, jury instruction.

The Court: As I see it, there is really one mo-

tion, and sort of a request or notice to the defendant to produce Mr. Hughes, or else; that you are going to comment to the jury and that you are going to ask the court for an instruction.

In looking over these Rules of Civil Procedure you are impressed by the breadth of these rules, except that they do not mention this particular situation. The discovery proceedings in Federal Courts are very broad, the parties can be required to produce documents, permit premises under their control to be inspected, to make admissions of fact, to answer written interrogatories, to give depositions, to submit to physical and mental examinations; and there is ample teeth in Rule 37 to compel compliance with these orders. It provides, first, that the party can be held in contempt. There are various provisions here. One of them is 37(b)(2)(iii):

“An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed,”

Of course, as far as the defendant is concerned he may not be concerned how long the proceeding is stayed.

“or dismissing the action,”

Well, that is no penalty against the defendant.

“or proceeding or any part thereof, or rendering [213] a judgment by default against the disobedient party;”

Then (iv):

“In lieu of any of the foregoing orders or in addition thereto, an order directing the ar-

rest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.”

Offhand it is hard for me to believe that Congress—that the Supreme Court would have proposed and Congress approved these rules without having in mind that the court should have power to compel a party to a proceeding to comply with the orders of the court. For instance, notice is given of a deposition, if a party doesn’t appear penalties can be applied; or if a party refuses to answer written interrogatories there are penalties to be applied. Although it is not spelled out, it seems to me that the rules are sufficiently broad to indicate the power of the courts to control the litigants that appear before them.

That is a very offhand opinion. It does mean reading between the lines on the rules. But when you read the rules and their purpose, it is to make it possible for the court to conduct full discovery proceedings before trial, and as an adjunct to the trial, part of the pretrial and a pretrial is really part of the trial itself. [214]

I am not going to take any further time on it this afternoon. I will put the matter down for hearing tomorrow morning at 9:30 before the jury comes down, and we will consider the matter further. I think we ought to clear a little brush away here.

No. 1, is it stipulated that Mr. Hughes is within the jurisdiction of this court at the present time?

Mr. Knupp: No, if the court please. I discussed

this matter with your Honor and counsel in chambers and indicated something of what I thought Mr. Hughes might be doing at the present time, and my present information is that he is not in the State at the present time.

The Court: You didn't tell me that the day before yesterday.

Mr. Knupp: I didn't know it, if the court please, because when we came in on the matter I had no such information, and I am not sure of it now, if the court please, but that is my last information.

The Court: Is there any way for you to ascertain through your client where Mr. Hughes is at the present time?

Mr. Knupp: I think I can ascertain this evening, if the court please, where he is.

The Court: I would like a statement tomorrow morning from you, as an officer, of this court, as to where Mr. Hughes is, to the best of your information. [215]

Mr. Knupp: Yes, if the court please, I will have that information.

The Court: Secondly, it seems to me—I don't know that the record is clear as to what stipulation was made, if any, as to the activities of the marshal and the private agency that tried to serve Mr. Hughes. If there is a stipulation as to those activities as stated by Mr. Rudin, then the record will be clear. If there is not, then I think that an affidavit should be produced by the marshal as to what he did, and by the agency as to what they did in trying to serve a subpoena on Mr. Hughes.

Mr. Knupp: I have no personal knowledge of that, as your Honor must realize. I assume that Mr. Rudin has stated the facts correctly. I wouldn't question his statement. I have never questioned a statement of counsel on the other side about things of that character.

The Court: I thing the record would be in better shape if an affidavit was presented by both the marshal and the agency as to the date on which they undertook an attempt to serve Mr. Hughes and what they did. It isn't too big a job to ask you to do it this evening.

Mr. Gang: May I be heard, your Honor?

May I ask your Honor to request Mr. Knupp in his statement, also, to ascertain what the whereabouts of Mr. Hughes has been since January 9th when we tried to serve him. We [216] would like the record to show that he was in the jurisdiction during most of the time that we were attempting to serve him.

The Court: Within general limits. I don't expect Mr. Knupp to tell us where he was every day, but if he can ascertain where he has been since January 9th, I think that would be helpful.

I think, also, if he is presently out of the jurisdiction there should be an attempt to ascertain when he intends to return to the jurisdiction.

I am not passing on any of these matters. I am going to read these cases, and I will hear from you tomorrow.

Finally, I suppose I could take judicial notice that Mr. Hughes is a busy man. On the other hand,

he is an executive of this defendant corporation, and as far as this court is concerned he is no privileged character. He is no more important than Mr. Youngman or Miss Sheridan or Mr. Gang or Mr. Knupp, and if the law is that certain things follow if he isn't produced, they will follow whether he is Mr. Hughes or whether he is the janitor of this building. So we will go into it further tomorrow morning.

I realize that he is a busy man, I realize that some of his activities concern the defense of this country, but at the pretrial conference or one of the conferences we discussed the fact that he could be presented within certain days of the trial out of order, and a statement was made that [217] probably 30 minutes of his time would be required, and although I don't know what the full calendar of Mr. Hughes is every day, I would hazard that there are 30 minutes during the day that his time is spent in activities that are not quite as profitable as testifying before the Federal Court. I don't think we should use the word "profitable," but say as important as testifying before the Federal Court.

In any event, in view of the request counsel have made for the production of Mr. Hughes, in the event he is not produced, and in view of Mr. Knupp's stipulation, I think I will permit counsel for the plaintiffs to argue to the jury that had he been produced his testimony would have been adverse generally to the position of the defendant.

I will also consider tomorrow morning the ques-

tion as to whether or not the court should give an instruction to the jury to the same effect.

Do any of these cases you have cited deal with the matter of instructions?

Mr. Rudin: Yes, the California case dealt directly with that.

The Court: Mr. Knupp has indicated in his argument that as to any instruction it would have to be limited to certain particularities. I haven't read these cases in a long time, but my general recollection is that it is a general instruction that had he been produced his testimony would have been [218] adverse to the position of the litigant.

Mr. Knupp: It seems to me, if the court please, that it could only be adverse with respect to those matters which testimony of other witnesses indicated that he had some information.

The Court: Well, you can argue that, but it seems to me that we can't tell what his testimony would be until he gets here. All we can say is that it would probably be adverse or he would have been brought in as a witness.

Mr. Knupp: Except it seems to me that unless there is some general limitation—Mr. Hughes was a party only to certain conversations, apparently, in connection with this case, and I don't know how he could be adverse to the defendant in any respect other than those conversations to which he may have been a party or those negotiations.

The Court: Well, the record so far only shows those conversations, but how do we know, if he was

introduced here as a witness, that it might not develop that he had other conversations?

Mr. Knupp: If he had any other conversations with the plaintiff or any of her agents, I assume those conversations would have been testified to here by the plaintiff or her witnesses.

The Court: Let's suppose he had a conversation with Mr. Rogell, that wouldn't be privileged, would it? [219]

Mr. Knupp: Mr. Rogell will be produced, if the court please.

The Court: Yes, but a litigant isn't bound to limit himself to the interrogation of one agent of a defendant. No conversation between Hughes and Rogell would be privileged, would it?

Mr. Knupp: Not with respect to this matter.

The Court: Suppose Mr. Hughes had unburdened himself and had told Mr. Rogell just why he wasn't going to come to terms with Miss Sheridan on the matter of a leading man? Let's speculate. It might be a very material conversation. Mr. Rogell might honestly take the stand and not recall it, but Mr. Hughes might under proper cross-examination.

We will talk about it more tomorrow morning.

Mr. Knupp: Can Mr. Gang and I talk to your Honor?

The Court: Yes.

(The following proceedings were had at the bench:)

Mr. Knupp: I think I should have 10 minutes,

and I will try to see if I can find out where Mr. Hughes is. I ought to do it now, because tonight might be too late.

The Court: That is all right. We have the time.

Mr. Knupp: Fine. Thank you very much, your Honor.

(The proceedings were resumed in open court as follows:)

The Court: We will take a short adjournment and counsel will advise me when you are [220] ready.

(A recess was taken.)

(Whereupon the proceedings were resumed within the presence of the jury, as follows:)

The Court: Stipulate that the jury are present and in their proper places?

Mr. Knupp: So stipulated.

Mr. Gang: So stipulated. Mr. Banks, will you resume the stand, please?

POLAN BANKS

called as a witness by the plaintiff, having been previously sworn, was examined and testified further as follows:

Direct Examination

(Resumed)

By Mr. Gang:

Q. I think we recessed just after you were asked about the red carpet lunch. That took place,

(Testimony of Polan Banks.)

I understand, sometime towards the end of June of 1949?

A. I believe it was.

Q. Mr. Banks, you have a soft voice.

A. I am sorry, I have a cold.

Q. Would you lift it just a trifle?

A. I will try. I believe it was, sir.

Q. At your next meeting with Miss Sheridan, Mr. Sparks, and others, after the 4th of July—

A. I don't remember the actual date. [221]

Q. Is there any fact which might fix the date in your mind? By that I mean was your next meeting before or after you received word that Mr. Young would not play the part of Dr. Quentin?

A. That I am not sure of, sir, because we were still working on the script, I believe, at that time.

Q. If I state to you that it has been testified here and that documentary evidence has been introduced here that the information with reference to Mr. Young came to the attention of plaintiff and the defendant sometime after the 4th of July, would that help you fix the date?

A. Yes, it is very probably true.

Q. And can you tell us, then, how you heard that Mr. Young was not to play the part of Dr. Quentin?

A. I was informed first by Mr. Nat Goldstone, my agent, with whom I was in contact about it, it happens Mr. Goldstone also represented Mr. Young, and I don't remember whether I informed Mr. Sparks then or whether Mr. Sparks already knew it from the front office.

(Testimony of Polan Banks.)

Q. Was this statement made to you by Mr. Young's agent after he had received the script as it was at that stage early in July?

A. Yes, I believe it was.

Q. You state that you did discuss the matter with Mr. Sparks? [222]

A. I am almost certain I did.

Q. Did you discuss it with Mr. Rogell?

A. I do not believe so. I am not certain.

Q. In your relationship with RKO you took matters up with Mr. Sparks who was your immediate superior? A. Almost entirely.

Q. And he took it up with Mr. Rogell?

A. Yes.

Q. Can you tell us what then happened after this act had taken place?

A. Do you mean the act, sir, of Robert Young turning down the script?

Q. Robert Young turning down the part, yes.

A. Well, we then all set about trying to find another leading man, and we had a number of meetings in which we discussed various possibilities.

Q. Can you first tell us over what period of time the meetings took place?

A. To the best of my recollection I think it was over a period of a couple of weeks.

Q. Running from the first third of July to the end?

A. Roughly from the fourth of July to the end of the month, or the 21st, something like that.

Q. Were they conferences?

(Testimony of Polan Banks.)

A. Well, they were informal talks on the part of Mr. [223] Sparks and myself, and then there were conferences together with Miss Sheridan and her agent—and Mr. Hickox.

Q. Can you tell us as best you can what took place at the first of those meetings?

A. The first of those meetings, as I remember it, it is quite a while back, I think we went through the casting book Mr. Sparks brought out, and we discussed informally a number of people, the various reasons the names that came up either weren't available or weren't considered available at the time.

Q. Was there any discussion at this meeting as to the reason for Mr. Young's refusal to play the part?

A. Yes, the discussion, as I remember it, was over the fact that—the way the script had been rewritten, had been changed, how Mr. Young had declared the part according to the new script no longer measured up to what he expected from it before, and I remember some of the discussion was about finding another leading man that might not have the same objection.

Q. Did Mr. Sparks participate in that discussion? A. Yes, of course.

Q. Did he express any opinion with reference to the statements that had been made about the part being small now?

A. I don't remember specifically. It was general conversation. [224]

(Testimony of Polan Banks.)

Q. Is it fair to say that the consensus of all present was that there would be difficulty in finding a replacement for Mr. Young because of the way the script had been rewritten?

A. I wouldn't say exactly.

Q. Tell me what it was to the best of your ability.

A. I don't remember exactly the gist of the conversations except that we all knew that there was a limited number of leading men available, we believed since we had the script finished that the part called for a leading man—we didn't all perhaps agree—I didn't agree myself that Bob Young shouldn't have liked the part as it was——

Mr. Knupp: Mr. Banks, I am sorry, I can't hear you. It is awfully difficult from that distance to me to hear, and I can't hear you.

The Court: Where was I?

(The answer thus far given was read by the reporter.)

The Witness: As a matter of fact, I wanted at the time to see Mr. Young and talk to him and try to talk him into reconsidering, or into letting us rewrite it according to how he might suggest. I talked to my agent Goldstone about it, and he said he tried to reach Young and he reported to me that Young was out of town, that he reached him by telephone and he said he definitely didn't want the part as it then was.

The Court: Does the record show whether this

(Testimony of Polan Banks.)

witness was [225] an employee of the defendant at the time?

Mr. Gang: Yes, it shows he was employed to act as sole producer of the picture.

The Court: Is this witness called under 43(b) also?

Mr. Gang: No, he is not. He is called as our witness.

The Court: All right.

Mr. Gang: He is also subpoenaed by the defendant, if the court please, but I have called him as our witness.

The Court: All right.

Q. (By Mr. Gang): Was there any discussion with Mr. Sparks at that time with reference to RKO taking steps to force Mr. Young to play this part? A. That, frankly, I don't remember.

Q. Was there any such discussion between you and the officials of RKO?

A. To force Mr. Young——

Q. Taking steps under their contract, if they had any, to require Mr. Young to perform?

A. Not to my recollection.

Q. Was anything said about anybody from RKO attempting to persuade Mr. Young to reconsider other than you?

A. No; the only thing I remember in that connection was that I believe, if I remember rightly, Mr. Sparks asked Miss Sheridan if she would like to talk to him. I may be wrong. Miss Sheridan may have suggested it herself. I know [226] the

(Testimony of Polan Banks.)

suggestion came up, in which Miss Sheridan was willing to try to contact Mr. Young to talk to him, and I contacted, again, Mr. Goldstone, and he said that it would be practically impossible to talk Young into doing it.

The Court: Keep your voice up. The jurors are having difficulty, and I know counsel are. Speak as loudly as you can, Mr. Banks.

The Witness: I will do that, sir.

Q. (By Mr. Gang): Does anyone have a cough drop?

A. I am sorry. I have been taking this medicine. I will try to talk as loudly as I can.

Q. Do you remember in these conversations, and if you cannot separate them, I can't expect you to do better than try, I will try to segregate them as I understand they took place, and you correct me if they do not agree with your recollection—do you remember a discussion in which the name of Mr. John Lund was mentioned?

A. Yes, I do remember that Mr. Lund was mentioned.

Q. Can you state what was said and by whom?

A. Well, I know his name came up when we were discussing the possibilities for leading men, I believe Mr. Sparks said that he would make inquiries to see if Mr. Lund was available.

Q. Did Miss Sheridan say anything about Mr. Lund?

A. At that time I don't believe—to the best of

(Testimony of Polan Banks.)

my [227] recollection at that time I don't believe she passed judgment on him.

Q. Subsequently did she, if you remember?

A. To be very honest, I don't remember completely.

Q. Was any suggestion made with reference to Mr. Richard Conte?

A. Yes, there was a reference made to Mr. Conte.

Q. Do you know who made it?

A. I am not sure who brought the name up.

Q. Do you remember what Miss Sheridan said about Mr. Conte?

A. To the best of my recollection Miss Sheridan didn't approve of Mr. Conte for the role.

Q. That is your best recollection?

A. Yes.

Q. Did you ever hear about a script being asked for by Fox with reference to Mr. Conte?

A. Being asked for by Fox?

Q. Yes. A. No, I do not.

Q. Was the name Richard Basehart mentioned?

A. Yes, and I remember it being put to Miss Sheridan and she said she thought he was too young for that particular role.

Q. What did you say about it? [228]

A. I agreed with her, as it happened.

Q. Was any discussion had with reference to the possibility of Wendell Corey playing the role?

A. Yes; as a matter of fact, Miss Sheridan and Mr. Hickox and myself, and I think—I am

(Testimony of Polan Banks.)

not sure—I think Mr. Sparks was with us, he may not have been, walked over to Paramount Studios next door to look at some film on Mr. Corey, and Miss Sheridan didn't see him for the role either.

Q. Did you express any opinion?

Mr. Knupp: I didn't get the last answer, Mr. Reporter.

The Witness: Miss Sheridan—I believe I said Miss Sheridan didn't see him for the role. I believe that was the phrase I used.

The Court: Can't you speak louder, sir?

The Witness: I will try, sir.

The Court: Do you have to direct pictures?

The Witness: No, sir, I don't.

Mr. Gang: He writes them, your Honor.

The Witness (Continuing): I agreed on that particular occasion, I agreed that I didn't see Mr. Corey for the role, either.

Q. (By Mr. Gang): Do you remember an occasion upon which the name Franchot Tone was used? A. Yes, I do.

Q. Where did the conversation take [229] place? A. In Mr. Sparks' office.

Q. Who was present?

A. To the best of my recollection Mr. Sparks, Miss Sheridan, Mr. Hickox, and myself; I don't remember whether there was a fifth party or not.

Q. Who mentioned Mr. Tone's name?

A. To the best of my recollection Mr. Sparks first mentioned his name.

(Testimony of Polan Banks.)

Q. Can you remember now that his name was mentioned?

A. Yes, we had been canvassing practically everybody we could think of in a general discussion, it came towards the end of the discussion, and, as I remember it, Mr. Sparks threw into the hopper the suggestion, he said, "What do you think about Franchot Tone?" And Miss Sheridan hesitated, as I remember it, and said something to the effect that—these aren't the exact words, because I don't remember them—something to the effect that that might not be a bad idea, and Mr. Sparks, as I remember it, said, "I think he is on the lot now; would you like to have a look at him?" And then he sent for Mr. Tone or called and arranged for Mr. Tone to come in. There was some general conversation, particularly between Miss Sheridan and Mr. Tone, both of whom had just recently returned from Europe, and afterward Mr. Tone left the office and Miss Sheridan said she thought that he might be very good for the role. [230]

Q. What did Mr. Sparks say?

A. Mr. Sparks said in that case he would have to take it up with the front office.

Q. What did you say?

A. I don't remember that I made any particular comment on it.

Q. Were you in agreement that he would be suitable for the role?

A. I don't frankly remember.

Q. You did not object, however?

(Testimony of Polan Banks.)

A. Not at the time, no.

Q. Did you subsequently hear of what happened with reference to Mr. Tone?

A. Yes, I heard that the New York office, when the proposition of having Mr. Tone was brought to them, turned it down for the reason that they said that a cast with Mr. Tone and Melvyn Douglas would, in conjunction with Miss Sheridan, look too much like a reissue, particularly because of the two men in the picture, so they were against the project. For that reason, basically, I think Mr. Tone was turned down.

Q. Do you remember any discussion with Mr. Stevenson, the director, and Mr. Parsonnet about the suitability of Mr. Tone for the role?

A. Not specifically. [231]

Q. Just generally do you remember talking about it?

A. I know I talked to both Parsonnet and Mr. Stevenson at various times, but I don't remember exactly what that conversation was about.

Q. Meetings at which you discussed the difficulty of casting that part, did you discuss with the writer and the director the building up of that part?

A. Yes, I did.

Q. Was that done? A. Yes, it was.

Q. Can you remember when in the discussions the name of Robert Mitchum came up?

A. To the best of my recollection Mitchum's name came up almost near the end, the very end of this whole affair. I believe Miss Sheridan asked

(Testimony of Polan Banks.)

me one day when we were leaving—when the group of us were leaving the studio dining room, what did I think of Bob Mitchum, and I thought he would be wonderful if we could get him, and she said, “I would like very much to have him if we could get him,” to speak to the front office. I spoke to Mr. Rogell the next time I saw him, and he said he thought it would be impossible because Mr. Mitchum was in another picture and scheduled for another one to follow that. I so reported to Mr. Hickox, who I believe told Miss Sheridan.

Q. Were you informed of the meeting that took place [232] Monday, August 15th, between Miss Sheridan and Mr. Hughes?

A. Yes, I learned about it.

Q. Later? A. Yes.

Q. You were not present?

A. No, I was not present.

Q. Did you meet Miss Sheridan on Tuesday, the 16th of August? A. Yes, I did.

Q. Did she tell you she had seen Mr. Hughes the night before? A. Yes, I believe she did.

Q. Did she tell you what the conversation was about in general?

A. Yes, I think so. As I remember it, she told me that she and Mr. Hickox both, that they had discussed the various people that we had in mind already and that Mr. Hughes wanted her to particularly consider again Mel Ferrer and Robert Ryan, and that the upshot of the conversation was that Mr. Hughes suggested or requested Ann to look

(Testimony of Polan Banks.)

at some more footage on these two people the next day, and she agreed to do it and she came to the studio the next day to see it.

Q. You sat in the projection room with Miss Sheridan and watched the film?

A. Yes, I did. [233]

Q. Was there any discussion on that occasion with reference to Charles Boyer?

A. I don't remember whether it was on that particular occasion, but I know we had discussed Boyer during that week sometime.

Q. Were you consulted with reference to the termination of Miss Sheridan's contract?

A. No.

Q. When did you first learn of it?

A. I learned of it I think the day that everybody else did, when it appeared in the papers.

Q. That would be Friday, the 19th of August?

A. Yes.

Q. Did you talk to Mr. Sparks about it?

A. Yes.

Q. Had he been informed of the act?

A. I believe it came as much a surprise to him as it did to me.

Q. Were you consulted with reference to casting Robert Mitchum in the Dr. Quentin role?

A. No, I was not.

Q. Were you informed of that after it had been done?

A. Yes.

Q. Is the same true of Ava Gardner?

A. Yes. [234]

(Testimony of Polan Banks.)

Q. Did you continue with your work on the production between the 16th of August and early in September when Mr. Mitchum and Miss Gardner were assigned to the picture? A. Yes, we did.

Q. The activities on the picture were not discontinued at any time?

A. Well, I was at work at that time, if my memory serves me, still with Mr. Parsonnet on polishing up the script.

Q. In other words, nobody from RKO told you to stop what you were doing? A. No.

Q. And you continued on just as you had in the past? A. Yes.

Q. And you stayed on with the picture after Mr. Mitchum and Miss Gardner were assigned to it? A. Yes.

Q. The script was revised again, was it not?

A. Yes, it was.

Q. This was to meet Mr. Mitchum's requirements? A. Yes.

Q. The picture went into rehearsal late in September, 1949, did it not? A. Yes.

Q. Photography was completed about the middle of [235] November, 1949?

A. Roughly about that time.

Q. And the script as it was made was substantially the story which you had written to be made when the contract of April 29, 1949, was signed?

A. Basically it was the same story. The characterization was changed a little bit, one or two of the characters.

(Testimony of Polan Banks.)

Mr. Gang: Thank you very much. You may cross-examine.

Cross-Examination

By Mr. Knupp:

Q. Mr. Banks, I understand that you are the author of the novel "Carriage Entrance"?

A. Yes.

Q. Have you written other novels or plays or other literary work?

A. Yes, I have written nine other books and many stories.

Q. And your activities principally have been in the literary field? A. Yes, sir.

Q. Had you ever acted as producer of a motion picture? A. No, sir, not before this.

Q. So that, what you were doing in this instance was your first effort in that field?

A. That's correct, sir. [236]

Q. At that time you had, I assume, no practical experience in the way of the production of pictures or in the casting of pictures or any of the details that enter into the production of a motion picture?

A. Not in actual practice, in one sense, but in another sense I had been around the studios for 15 or 20 years as a writer around sets and offices.

Q. But in the actual experience of having done those things, that you never had? A. No, sir.

Q. For that reason, I understand, or at least that was one of the reasons the studio assigned Mr. Sparks to assist as a producer along with you in this picture?

(Testimony of Polan Banks.)

A. Well, not specifically. In a sense that is true, and in another sense it is not, because of this: My original deal was discussed there with Mr. Tefler. I was told, which I believe is true, that all RKO "A" pictures, top pictures, have an executive producer as well as the regular producer of the picture. Also when I made the deal originally it was to have been an independent picture releasing through RKO, and because of my inexperience in the past they were going to put a liaison man from the front of the studio on to work with me. As I understood it and my memory serves me, in our original deal he was to have no title whatsoever, but then when the details were worked out it was [237] decided that the so-called executive producer, which is put on ordinary RKO pictures, would serve in that capacity. Later when my contract was changed, in other words, when the independent contract was changed to RKO buying the package outright I became an employee of RKO as a normal producer and an executive producer was placed over me as was done in the other pictures.

Q. You negotiated the original deal by which Miss Sheridan was to appear as the female star in this picture? A. Yes, sir.

Q. With whom did you negotiate that deal?

A. With Miss Sheridan herself.

Q. Did you have any negotiations in that respect with Andrew Hickox?

A. Well, the actual negotiations, what you might call the important negotiations as to the contract,

(Testimony of Polan Banks.)

took place with subordinates in the office of Loyd Wright, Miss Sheridan's attorney. Mr. Hickox was present as Miss Sheridan's business manager at every meeting I attended. Later after the deal was put together and Miss Sheridan went to Europe to do another picture all the contacts I had entirely were with Mr. Hickox.

Q. Who at that time was her business manager?

A. Yes.

Q. Was any consideration given to Mr. Hickox by you [238] personally for his services on behalf of Miss Sheridan in this negotiation?

A. Would you mind explaining that a little bit, sir?

Q. I beg your pardon?

A. Would you mind explaining that question a little bit?

Q. Was there any consideration which you paid to Mr. Hickox for his services as business manager of Miss Sheridan in negotiating this picture?

A. Yes, sir, there eventually was, but not at the beginning of the deal. After Miss Sheridan went to Europe.

Q. What was that?

A. The consideration that we eventually arrived at after a meeting, and this was when I had it as an independent picture releasing through RKO, was that Mr. Hickox was to get 10 per cent of the producer's net profits for acting as liaison man with Miss Sheridan.

(Testimony of Polan Banks.)

Q. And did he actually receive anything for his services?

A. He received eventually from me \$5,000 cash.

Q. You say that the screen play was rewritten by Marion Parsonnet, Mr. Banks. In what shape was the script at the time Mr. Parsonnet went to work?

A. We had a completed script by Leopold Atlas, which I paid for myself, and that had been after another couple of [239] writers had worked on it. In other words, when I sold my package to RKO I sold my commitment, my services as a producer, and a complete shooting script. The studio decided of their own volition to rewrite the script.

Q. You are sure now, Mr. Banks, that the script which Mr. Atlas had written was complete? The reason I ask that, frankly, is that I had some information that two-thirds of the script had been written and the rest of the story, the action was merely indicated.

A. You may be right about that, sir. Come to think of it I think it was partly unfinished. I am not sure, however, because I haven't looked at the script or seen it for a very long time. But that is quite possible.

Q. You are not in position to say that you did have a completed script at the time you sold the package?

A. No, but the script was complete enough, there was enough of it there, meaning more than two-thirds of the script as I remember it.

(Testimony of Polan Banks.)

Q. You think practically two-thirds of the script?

A. To anybody in the business who knows stories, any executive or producer, or anybody else, you can tell from one-third or one-quarter of a script, if you have the complete outline of a story, and then enough of the script to show how skilled the writer is who is doing it. It was only a matter of detail finishing the rest of the script. In the rewriting [240] of the script later the studio did the characterizations, it was radically changed.

Q. In this rewriting of the script by Mr. Parsonnet were you consulted? A. Yes, I was.

Q. As a matter of fact, you and Mr. Parsonnet worked very closely together, didn't you, on the rewriting of this script? A. Yes, we did.

Q. What in your judgment was the result of Mr. Parsonnet's rewriting?

A. I thought we had a very competent script?

Q. Particularly with respect to this character, Mark Lucas, did you feel that the rewriting of the script had lessened or had increased the worth of that character?

A. As a matter of fact, it had increased his stature, because it was one of the original weaknesses of the original story, that the male lead needed building up.

Q. So when the rewriting was completed by Mr. Parsonnet and you, you felt that the character, Mark Lucas, was more worthy of the talents of

(Testimony of Polan Banks.)

some of these leading men than it had been theretofore?

A. Yes, I believe I can say that truthfully.

Q. You assumed, I think you said, Mr. Banks, that at the time this deal was made at RKO that the picture was all [241] ready to go into photography, that is to say, you had a script which was at least two-thirds finished, you had an engagement with Miss Sheridan to play the leading female part, and you had or thought you had an engagement with Mr. Robert Young to play the leading male role?

A. That is correct, yes, sir.

Q. And Miss Sheridan had approved any one of three directors?

A. Yes, sir.

Q. All of whom would possibly be available?

A. Yes, sir.

Q. So at that time you assumed that the production was one upon which RKO could immediately engage?

A. Yes, sir.

Q. And as far as you determined at the studio was that the general feeling there, everybody, that you were handing them or selling them a package with which they could immediately engage in the production of a picture?

A. Yes, sir; I think our first noticeable snag came when we learned that Robert Young didn't want to do the script.

Q. As far as you were able to determine from the conversations that you had or heard at the studio, that was as much of a surprise to everybody there at the studio as it was to you?

(Testimony of Polan Banks.)

A. About Mr. Young? [242]

Q. Yes. A. Yes, sir.

Q. It was generally assumed that Mr. Young would do the part and there would be no difficulty about it? A. Yes, sir.

Q. And as far as you knew it was contemplated that the picture would start shortly after the time when the script was submitted to Mr. Young? That I say to you was on July 11th.

A. Yes, sir. As a matter of fact——

Q. July 7th.

A. In fact, as I remember, we had hoped to start it even a month before that.

Q. After Mr. Young had indicated that he would not do the part, did you make any effort to secure his services in the role? A. Mr. Young?

Q. Yes.

A. I tried to reach Mr. Young through my agent, I had already talked to him originally about the script, and he had left town, he had gone up to his ranch up in northern California somewhere, and my agent informed me that he definitely did not want to do the script under its new guise.

Q. When you speak of your agent you mean Mr. Goldstone?

A. Yes, who also happens to be the agent for Mr. Young. [243]

Q. So in these conversations you had with Mr. Goldstone he was representing both you and Mr. Young? A. Yes, sir.

Q. What conclusion did you reach, Mr. Banks, from these conversations with respect to the pos-

(Testimony of Polan Banks.)

sibility of securing the services of Mr. Young in this role?

A. At that particular time, sir?

Q. Yes, at that particular time, after your talks with Mr. Goldstone.

A. I reached the conclusion that it would probably be impossible to get him, to make him change his mind.

Q. Do you know whether anybody at the studio made any effort to induce Mr. Young to change his mind? A. That I do not know, sir.

Q. Did you talk to Mr. Sparks about any conversations he may have had with Mr. Goldstone in an effort to induce Mr. Young to change his mind?

A. I don't remember specifically, sir.

Q. I think you said that shortly after this notice was received from Mr. Young in which he indicated his disapproval you set about trying to find someone else to play the part, is that correct?

A. Yes, sir.

Q. And those efforts consisted of conversations with Miss Sheridan? [244]

A. And Mr. Sparks.

Q. Mr. Sparks. And who else was present at those conversations?

A. Well, whenever Miss Sheridan was present Mr. Hickox was present with her.

Q. That is Miss Sheridan's business manager?

A. Yes, sir.

Q. And commencing at the time you started on these efforts to secure another leading man and

(Testimony of Polan Banks.)

continuing until the contract with Miss Sheridan was terminated, was Mr. Hickox present on every occasion at the studio when Miss Sheridan was present?

A. To the best of my recollection, yes.

Q. I mean, of course, when you were present, too?

A. To the best of my recollection, yes.

Q. I think you said in answer to one question by Mr. Gang that you discovered in going through the casting directory, or the volume which contained the names of the men who might be available, that there were a limited number of leading men who might be available for this part?

A. Yes, sir.

Q. Do you recall just what you did ascertain in that respect about the number of possibilities for this part that there might be?

A. Do you mean the names, sir? [245]

Q. Yes, by going through the names.

A. Well, as I remember it, the upshot of our conversations, Mr. Sparks and my own, and whoever else was with us at the time, was that it was limited to roughly about five or six people.

Q. And did those five or six people include the names of Ryan, Ferrer, Preston, and Basehart?

A. Yes, sir.

Q. Why did you conclude that the number of men who might be available was so limited?

A. First of all, as is generally known in the industry, leading men are pretty hard to get any-

(Testimony of Polan Banks.)

way, most of the ones that would fit this particular part were either under contract to other studios or were working at the moment, at the time we wanted them for the picture, which I believe Mr. Sparks had already ascertained through the casting office if I remember rightly, and it eventually worked out that there was something like five or six men that we were pretty sure could be gotten for it.

Q. That you thought might do for the part?

A. That might be possible.

Q. Yes. I think you mentioned that during some of these conversations the name of Mr. Basehart was mentioned?

A. Yes, sir.

Q. And Miss Sheridan said that he was too young for the [246] part?

A. I believe so, sir.

Q. And I think you said you agreed with her in that respect?

A. I think I did, sir.

Q. And you said that the name of Conte was mentioned?

A. Yes, it was.

Q. Did you say whether Miss Sheridan approved or disapproved Conte?

A. I frankly don't remember at this moment specifically whether she did approve or disapprove of him.

Q. If she approved of him you have no recollection of it at the present time?

A. No.

Q. Was the name of Preston mentioned?

A. Yes, the name of Preston was mentioned, and Miss Sheridan didn't like him at all for the part, and I happened to agree with her on it.

(Testimony of Polan Banks.)

Q. What did Miss Sheridan say about Preston, if you recall?

A. To the best of my recollection she didn't think that he was fitted for the role as she saw it.

Q. And you saw Wendell Corey in a picture?

A. Yes, we did.

Q. At Paramount? [247] A. Yes, sir.

Q. What did Miss Sheridan say about him?

A. As I remember, she said she couldn't see him at all as Dr. Quentin.

Q. And did you indicate whether or not you were in agreement with her in that respect?

A. As it happens, I was, yes.

Q. Did you see anybody else who might have been mentioned for the part in any pictures?

A. We also discussed Mel Ferrer and Robert Ryan.

Q. What did Miss Sheridan say with respect to Mel Ferrer?

A. I remember very distinctly the first time when we saw the picture "Lost Boundaries" she said she thought he was a very fine actor and had given a very fine performance in that picture, but she simply couldn't see him as Dr. Quentin in the picture. I happened to agree with her on that.

Q. What part did Mel Ferrer play in that?

A. He played the part of a Negro who passed as a white man.

Q. A Negro doctor?

A. I think he was a doctor. I am not sure. He was some sort of professional.

(Testimony of Polan Banks.)

Q. What was said with respect to Robert Ryan?

A. In regard to Robert Ryan Miss Sheridan didn't like him at all. I disagreed with her. I liked him. I didn't [248] think he was perfect for the part, but I thought of everybody available that he could very well do it, and I expressed myself to that extent.

Q. Did you urge on Miss Sheridan that she should accept Robert Ryan in the part?

A. I did at one time, yes.

Q. And you felt personally with Ryan in the part the picture would have been successful?

A. I felt that he would have been competent for it.

Q. Tone, as I understand it, was mentioned first in the conversation in the office of Mr. Sparks?

A. Yes, sir.

Q. Did you have any conversation with respect to Mr. Tone playing the part other than that conversation in the office of Mr. Sparks when he was first mentioned?

A. I believe that Mr. Sparks and I discussed him once or twice, we didn't think he would be perfect for the part.

Q. How soon after that was it that you determined that the studio was not agreeable——

A. Very, very shortly. If I remember rightly, I may be wrong on this, but I think it was within the next couple of days.

Q. So within two or three days after Tone was first mentioned for the part it was definitely known

(Testimony of Polan Banks.)

that the studio would not propose to put him [249] in? A. I believe so, sir.

Q. Do you recall when Mr. Mitchum's name first came up in connection with this role?

A. It first came up, as I believe I testified a little while ago, when Miss Sheridan asked me if it was possible to get Mr. Mitchum for the part, and that I spoke to, as I said before, I spoke to Mr. Rogell about it, and Rogell said it would be practically impossible because he was tied up in another picture and still another one to follow.

Q. Mr. Rogell told you at the time, did he not, Mr. Banks, what picture Mr. Mitchum was then appearing in?

A. Yes; I believe it was "Christmas Holiday," or something like that.

Q. "Christmas Holiday"? A. Yes.

Q. Did he tell you what picture Mr. Mitchum was slated to appear in following that?

A. "Jet Pilot."

Q. And because of these two commitments it would be impossible for Mr. Mitchum to appear in this picture?

A. That is what Mr. Rogell told me, yes.

The Court: Did you think Mitchum was O. K. for the picture?

The Witness: Yes, sir, I do, sir.

Q. (By Mr. Knupp): Do you recall a conversation that was [250] had with respect to the name of Charles Boyer? A. Vaguely, sir.

Q. Do you know when the conversation concerning Mr. Boyer came up?

(Testimony of Polan Banks.)

A. It was toward the last of the days that we were discussing people, we had almost given up hope on almost everyone else, and I don't remember exactly who proposed Mr. Boyer, but I think it was put up to Miss Sheridan, and she said she would accept Mr. Boyer if he were available.

Q. What did you think about Mr. Boyer as a northern doctor in this picture?

A. I didn't think he could do the northern doctor, exactly, but I did agree with someone's comment that the part could be changed making him a Creole, that he could very well—the story as you probably know was laid in New Orleans.

Q. Yes.

A. (Continuing): And the character could have been changed to a Creole instead of Bostonian.

Q. If the character had been rewritten?

A. If it had been rewritten, yes.

Q. When, if you recall, did Miss Sheridan see a certain script in which certain of these actors had appeared?

A. Would you mind qualifying that question, sir?

Q. Were there occasions upon which Miss Sheridan was shown script in which some of these actors appeared? [251]

A. Do you mean footage, sir?

Q. Pardon me. I mean film.

A. That is what confused me.

Yes, sir, there were.

Q. How many of such occasions were there when

(Testimony of Polan Banks.)

you were personally present, Mr. Banks?

A. I think three that I remember. That might have included the one with Wendell Corey. I know of two. We saw "Lost Boundaries" and I think another occasion with Mr. Sparks we saw some short footage, and then the third time on August 16th.

Q. Your present recollection is that the first film you saw was "Lost Boundaries"?

A. Yes, sir.

Q. And who appeared in that?

A. Mel Ferrer.

Q. How much of that did you see?

A. We saw the whole picture.

Q. Where did you see it?

A. In the projection room at RKO.

Q. Who was present?

A. Miss Sheridan, Mr. Hickox, Mr. Sparks, myself. I don't remember whether anyone else was with us, or not.

Q. Was it after Miss Sheridan had seen that film that she made the remark that she couldn't see Mr. Ferrer in the [252] part? A. Yes.

Q. What was the next film that you saw in which any of these actors appeared?

A. I think it was on the same occasion, if I am not mistaken, I think we saw parts of "Bed of Roses."

Q. What actors appeared in that?

A. Both Robert Ryan and Mel Ferrer were in that.

(Testimony of Polan Banks.)

Q. Do you recall what character Ryan played in "Bed of Roses"?

A. I think, I am not sure, but I think he played a philandering artist. I am not sure of that.

Q. Do you recall who had the leading female role in that? A. Yes. Joan Fontaine.

Q. You are acquainted with the work and talent of Miss Fontaine, I assume?

A. Yes, very well.

Q. She is, in your opinion, one of the leading ladies in the motion picture business?

A. Yes, sir.

Q. And worthy, I suppose, of the co-operation of some suitable leading men in any picture that she appears in? A. Yes, sir.

Q. Do you recall what part Ferrer played in that picture, [253] "Bed of Roses"?

A. I don't remember actually. I remember it only hazily, because I didn't see the whole picture. But I know he had an important role in it. At least the footage that I saw.

Q. How much footage of that picture did you see?

A. I don't remember how many reels, sir. It wasn't too much.

Q. You didn't see all the picture?

A. No, sir.

Q. And why didn't you see all the picture?

A. It wasn't run for us.

Q. Did Miss Sheridan indicate that she didn't

(Testimony of Polan Banks.)

want to see any more, or were you only to look at certain scenes?

A. I frankly don't remember that.

Q. Was Mr. Hickox present on this occasion?

A. Yes.

Q. I think you said he was present on all these occasions?

A. Yes, sir, he was.

Q. When was the next occasion when you saw any film at the studio?

A. I don't remember exactly whether there was another occasion between that occasion and August 16th or not. I have the impression that we did see some more film, but I [254] couldn't swear to that.

Q. Do you recall that on one occasion after you saw some film at the studio Miss Sheridan and Mr. Hickox went to the office of Mr. Rogell?

A. Yes, I do, sir.

Q. Do you remember what film it was that you saw on that occasion?

A. I think one was with Robert Ryan, and I don't remember what it was but I remember Robert Ryan was in it, and one was Bob Preston, I think, in a western, part of a western. We just saw some short footage of both.

Q. Have you ever seen the "Macomber Affair," I mean the picture entitled "Macomber Affair" with Robert Preston?

A. Not the whole picture.

Q. Did you see any part of the "Macomber Affair" on that date?

(Testimony of Polan Banks.)

A. Now that you remind me by the title, I think we did see the "Macomber Affair."

The Court: How much longer will you be, Mr. Knupp?

Mr. Knupp: Fifteen or twenty minutes, if the court please.

The Court: We will take a recess. Mr. Banks, have you ever been a witness before in court?

The Witness: No, sir.

The Court: Well, I don't think I have ever seen a court [255] room scene that was realistic, so I will look with interest to your next book, and possibly one of these days we will find a writer who will draw court rooms as they actually exist in this country.

Ladies and gentlemen of the jury, the court admonishes you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this cause, and you are not to form or express any opinion on the case until it is finally submitted to you for your verdict. We will take a short recess.

(A recess was taken.)

The Court: Stipulated that the jurors are present and in their proper places?

Mr. Gang: Yes, sir.

Mr. Knupp: So stipulated, if the court please.

Q. (By Mr. Knupp): Mr. Banks, when you concluded these efforts to secure a leading man for the picture "Carriage Entrance," and immediately preceding the time that the contract with Miss

(Testimony of Polan Banks.)

Sheridan was terminated, did you feel that you had pretty thoroughly canvassed the field of available leading men for the part?

Mr. Gang: I regret to object, as calling for the witness' feelings. They are subjective and I don't think they are material. I have no objection to his answering what they had done, but his feelings in the matter I don't think [256] are material.

Mr. Knupp: I don't think it is subjective at all. I am asking the question based upon what he knew of those available and what they had done about securing one who was available.

The Court: Read the question, please.

(The question was read by the reporter.)

The Court: Objection sustained.

Q. (By Mr. Knupp): I mean based upon what you had determined with respect to the available leading men and the efforts that had been made to secure one of such men.

A. I think, yes, sir, that we did about cover the field pretty thoroughly.

Q. And of those that might be available whom did you consider to be the most capable for this role? A. Robert Ryan.

The Court: Now, just a minute. When you say "those available," who do you consider as being available when you say Ryan was the most eligible one?

The Witness: I mean, your Honor, that among—I believe it was five, five people that we under-

(Testimony of Polan Banks.)

stood were available and were offered to Miss Sheridan.

The Court: Which ones were the five that were available when you said Ryan was the best choice?

The Witness: As I remember, Ryan, Mel Ferrer, Robert [257] Preston, John Lund, I think it was, Richard Basehart, and Wendell Corey.

Q. (By Mr. Knupp): May I suggest the name of Robert Preston? A. I mentioned that.

The Court: You exclude Tone, Mitchum, Boyer and Conte as being available?

The Witness: Yes, sir. Tone wasn't available because we were informed almost immediately by the New York office that they didn't want him. Mitchum I knew wasn't available because Mr. Rogell said he was tied up with two other commitments.

The Court: Go ahead.

Q. (By Mr. Knupp): When you saw these pictures at the studio on August 16th, Mr. Banks, did you have some conversation with Mr. Hickox?

A. Yes, I did, sir.

Mr. Gang: May I ask the court to find out if this was in the hearing of Miss Sheridan, and if not I shall ask that the question not be answered before I have an opportunity of objecting on the ground that it was outside the hearing of Miss Sheridan, as previously testified to on cross-examination by Miss Sheridan.

Mr. Knupp: I don't think the question whether Miss Sheridan was present is material at all, if the

(Testimony of Polan Banks.)

court please. [258] The gentleman to whom Mr. Banks was talking was her business manager and accompanied her on all these occasions, all these conferences. I think the relationship is such that we are entitled to have anything admitted that was done with her business manager.

Mr. Gang: Does the court wish it argued in the presence of the jury?

The Court: This is a legal argument and I am sure it will not affect the jury. Proceed.

Mr. Gang: At this time I ask if I might take over the witness on this point on voir dire.

The Court: Let's assume that it appears that Miss Sheridan was not present, isn't Mr. Knupp's argument good, isn't the situation similar to conversation with agents of the defendant?

Mr. Gang: There is a big difference between an agent and lawyer and a business manager. That is just the reason that I insisted on that distinction being observed. The witness himself has testified on cross-examination that his business dealings and the decision there—that his dealings were made with Miss Sheridan, not with Mr. Hickox; that all the arrangements were made with the lawyers for Miss Sheridan at Loyd Wright's office, and not Mr. Hickox. He was just present. He also testified that he employed Mr. Hickox to work for him and paid him \$5,000. So it seems to me no [259] foundation has been laid on any theory by which anything that Mr. Banks and Mr. Hickox talked about outside the presence of Miss Sheridan can be said to be

(Testimony of Polan Banks.)

binding upon her, and I object to any questions or conversations on that ground, your Honor.

The Court: Well, you haven't mentioned it, but isn't it outside the scope of your direct examination? You never inquired about this particular conversation.

Mr. Gang: That is correct. And thanks to your Honor for reminding me, I renew my objection and include that ground as well.

Mr. Knupp: If the court please, so far as relationship between Miss Sheridan and Mr. Banks is concerned, I think it appears that Mr. Hickox accompanied Miss Sheridan and negotiated in her behalf on all of these occasions commencing in July with the first visit that they made until this time. I think it is also clear that he was her business manager and——

The Court: But doesn't it also appear that he was acting for Mr. Banks also?

Mr. Knupp: No, it does not, if the court please. Mr. Banks said that when he made this deal with Mr. Hickox he paid him \$5,000. It doesn't appear that he was acting for Mr. Banks; it appears he was acting in behalf of Miss Sheridan. [260]

The Court: What do you say as to this matter of the scope of your cross-examination?

Mr. Knupp: If the court please, counsel has gone into these visits. If he assumes to omit one visit that he wants to omit, I think the scope of the examination is certainly not limited. He himself has gone into the question of Miss Sheridan having

(Testimony of Polan Banks.)

seen these pictures. I think we are entitled to bring out everything that went on at that time. We can't be limited simply because he didn't go into these matters.

The Court: Well, I don't think that is the rule. I think that the rule on the scope of cross-examination is such that a man may not open up certain subjects by direct examination and rely upon a ruling of the court that other counsel may not go into it in cross.

I am not so sure that the record shows this. Even if the record showed a visit or something that was done, but nothing said, and no questions were asked about what was said, I would question your right to cross-examine on the conversation.

I will sustain the objection on the ground that it is not proper cross-examination.

Mr. Knupp: That is subject to our right to recall Mr. Banks, then, if the court please. That concludes our cross-examination.

The Court: Do you want Mr. Banks to remain in attendance [261] or merely be on call?

Mr. Knupp: I want him to remain in attendance, if the court please.

The Court: You may step down. Do you have any questions?

Mr. Gang: I have a few questions, Mr. Banks.

Redirect Examination

By Mr. Gang:

Q. You stated on cross-examination, Mr. Banks,

(Testimony of Polan Banks.)

that when you talked to Mr. Rogell about Robert Mitchum he said that he was then engaged in a picture, "Christmas Holiday"? A. Yes, sir.

Q. Did he tell you when that would finish?

A. I don't remember the dates that were specifically mentioned, but he did mention, if I remember correctly, that "Jet Pilot" was due to start, and he mentioned a date and I forgot the date of that, too, but it was very shortly thereafter.

Q. To your knowledge has "Jet Pilot" ever been made by RKO to this day?

A. I know they started production on it when I left California last year.

Q. When?

A. I left here last February, and it was in production then. [262]

Q. In 1950? A. Yes.

Q. And it is a fact that Mr. Mitchum after finishing "Christmas Holiday" did not go directly into "Jet Pilot"?

A. No, because by that time he was in "Carriage Entrance" and John Wayne was put in "Jet Pilot" in his place.

Q. So he never did appear in "Jet Pilot"?

A. No.

The Court: Were both pictures made by the same studio?

The Witness: Yes, sir.

Q. (By Mr. Gang): Can you tell us what the characteristics of the Dr. Quentin part were so as to guide you in looking for suitable leading men?

(Testimony of Polan Banks.)

A. First of all, he was the hero, which would mean that he would have to be physically attractive both to the leading woman, presumably, and to the audience. He would have to be a handsome man. In connection with this particular story he was a scientist, a doctor, so he had to have some bearing, some personality. I think at the moment that is about all I could answer to that question.

Q. Was the character one that required some sensitivity in physical appearance, as well as emotion?

A. Not necessarily. I have known doctors and scientists who look like football players sometimes.

Q. I am talking about this particular character, Dr. [263] Quentin. A. Not particularly.

The Court: Somewhere in the evidence there was some talk that there was supposed to be some characteristic of weakness.

The Witness: We said, your Honor, in regard to that, not in his character so much as the character is drawn; he wasn't as strong in ratio to the heroine as he should have been, the part was a little smaller than it should have been.

The Court: I misunderstood. In other words, in comparison with the leading lady's part it was a weaker part, but there was to be no characteristic of weakness in his character?

The Witness: No characteristic of weakness in his character, no.

Q. (By Mr. Gang): Was there some necessity for a relationship between the two men, the part

(Testimony of Polan Banks.)

played by Melvyn Douglas and the part of Dr. Quentin, which required consideration?

A. Yes, there had to be some contrast as in all pictures.

Q. You say the man should have been physically handsome? A. Preferably, yes.

Q. Do you remember the "Macomber Affair" when you looked at it? [264]

A. Frankly, I don't.

Q. Did Mr. Preston have four days of whiskers on him?

A. I think I saw Mr. Preston in a Western.

Q. Do you remember what he looked like?

A. I remember what he looked like, yes.

Q. Did he have four days of whiskers, if you remember, on that occasion?

A. He was whiskered, yes.

Q. You said you agreed with Miss Sheridan in her opinion as to the suitability of Mel Ferrer, or unsuitability, rather? A. Yes.

Q. Did you talk to Mr. Sparks about that?

A. Yes, I believe I said so in Mr. Sparks' presence.

Q. What did he say?

A. Mr. Sparks—let me think now. As to the unsuitability, you say?

Q. Yes. A. I don't remember, frankly.

Q. You don't remember whether he disagreed with you or Miss Sheridan?

A. I don't remember exactly what he said.

Q. You also testified on cross-examination that

(Testimony of Polan Banks.)

you agreed with Miss Sheridan that Mr. Preston was not suited for this particular part? [265]

A. Yes.

Q. You discussed that with Mr. Sparks?

A. Yes, I think I did.

Q. And can you remember whether he agreed or disagreed?

A. I believe if my memory serves me correctly, I believe Mr. Sparks agreed with me.

Q. Would the same thing be true about Wendell Corey?

A. That I don't specifically remember Mr. Sparks' reaction to.

Q. What do you remember was Mr. Sparks' reaction when you said you agreed with Miss Sheridan about Richard Basehart?

A. I don't believe Mr. Sparks was there at the time that conversation took place.

Q. Did you discuss it with him at any other time?

A. Not that I remember.

Q. I think you answered the judge when he asked you if you thought Mr. Mitchum was suitable for the part, you said yes.

A. Yes, I think he was.

Q. Do you think he was more suitable than Mr. Ryan?

A. After having seen him in the picture, I think yes, that he was more suitable.

Q. You stated in response to a question that the search for leading men was concluded. Did you

(Testimony of Polan Banks.)

mean by that that you [266] stopped looking for leading men at any time, Mr. Banks?

A. No, we were continually, Mr. Sparks and I, delving or—I can't think of the right verb at the moment, but trying to search our minds, trying to think of a leading man that might possibly be available for the role.

Q. On that particular point, after you discussed with Mr. Sparks the news that you had read in the paper on Friday, August 19th, did you discuss with Mr. Sparks any further search for a leading man for the picture?

A. No, because as far as we knew, as I remember it, that date we didn't know what was going to happen to the picture.

Q. You kept on with your work, as you said on direct, you kept on working on the story?

A. After a few days had passed, I don't remember exactly what the conversations were, but my general memory, understanding of what happened was that Mr. Sparks suggested that we continue working on the script until something happened, until we heard from above. At that time nobody knew what was going to happen.

Q. Your best recollection now is how long after August 19th were you informed that Mr. Mitchum and Miss Gardner would appear?

A. Roughly, if I remember rightly, I think around the 1st of September. [267]

Q. In other words, around 10 days afterwards, is that right?

(Testimony of Polan Banks.)

A. No, I am wrong. I think it must have been about two weeks afterwards, because I know I went through a period of being rather worried whether we would get anybody.

Q. You testified on cross-examination that your original dealings with reference to Miss Sheridan in "Carriage Entrance" were directly with her?

A. Yes, they were.

Q. Was Mr. Hickox present when you talked to Miss Sheridan?

A. When the original deal was made?

Q. Yes. A. No.

Q. You made that original deal directly with her?

A. I made the original deal directly with Miss Sheridan at her home in the valley.

Q. It was with reference to playing in "Carriage Entrance"? A. Yes.

Q. And it concerned the amount of money she would get? A. Yes.

Q. And the percentage of the profits she would get, is that right?

A. Yes, I think we talked about that. I am not sure [268] whether we went that much into detail.

Q. Did she then tell you to take the matter up with her lawyers? A. Yes, Loyd Wright.

Q. Did she say who her lawyers were?

A. Yes, Loyd Wright.

Q. Did you subsequently take the matter up with Loyd Wright?

(Testimony of Polan Banks.)

A. Yes, that is when I met Mr. Hickox for the first time in Mr. Loyd Wright's office.

Q. In negotiations with reference to the contract the matters were taken up by you or your attorneys with Mr. Loyd Wright's office?

A. More or less.

Q. When you say that, what do you mean?

A. By that I mean when any question came up about the contract itself my attorneys handled it, they were in touch themselves with Loyd Wright's office.

Q. On matters of script and story, would you take it up yourself?

A. I took it up with Miss Sheridan directly until she went abroad.

Q. And arrangements with Miss Sheridan were made either with Miss Sheridan or her attorneys?

A. Either directly with Miss Sheridan, or after she [269] went abroad, at her direction, with Mr. Hickox.

Q. With whom? A. With myself.

Q. With reference to what?

A. Miss Sheridan went abroad to make a picture for Twentieth-Century Fox, "I Was a Male War Bride," and that changed our plans production-wise, and at the time I remember we discussed the matter of dates, as to approval she had as to script, certain date approvals, and I asked her how I would get the decisions in time, and she said she would be in contact, that her business manager was in constant contact with her, and she would send all news to him through her cables to him.

(Testimony of Polan Banks.)

Q. He was her liaison between you and her?

A. Yes.

Q. After the contract of April 29, 1949, was signed, your dealings were with Miss Sheridan?

A. When she was in town I had discussions with her, but most of the telephone calls were made by Mr. Hickox for her.

Q. You would call him to get in touch with her, is that right? A. Yes.

Q. Any decisions that were made in your discussions were made by Miss Sheridan, is that right?

A. As I understand it, all major decisions were always [270] made by Miss Sheridan.

Q. She never told you that Mr. Hickox could make any decisions for her?

A. Not that I remember, no.

Mr. Gang: That is all.

Mr. Knupp: Just a moment.

Recross-Examination

By Mr. Knupp:

Q. Mr. Banks, you said you met Mr. Hickox at Mr. Loyd Wright's office. In what connection did you first meet him?

A. When I went to Loyd Wright's office to discuss the first option agreement I was to get on Miss Sheridan's services.

Q. And for what purpose was Mr. Hickox there?

A. To inform, I imagine, the Loyd Wright office as to what terms Miss Sheridan wanted.

Q. He was there as Miss Sheridan's representative, was he not? A. Yes.

(Testimony of Polan Banks.)

Mr. Gang: Just a minute. I object to that as calling for a conclusion of the witness as to what he was there as.

Q. (By Mr. Knupp): Did he tell you what he was there for?

The Court: Objection sustained to the other question.

Q. (By Mr. Knupp): Did he tell you what he was there [271] for?

A. No, sir. All I knew was that he was representing Miss Sheridan.

Mr. Gang: I ask that be stricken.

Mr. Knupp: I think, if the court please, if he was there pretending to be a representative of Miss Sheridan's this witness could certainly testify to that. He was there for some purpose. This witness ought to know what he did or what he represented as to why he was there.

The Court: We would have to have what he said and did.

Q. (By Mr. Knupp): What did Mr. Hickox do during those negotiations in Mr. Wright's office?

A. That was the time that Miss Sheridan was leaving unexpectedly for Europe, and she had apparently told him her wishes as to minor details in the contract.

Q. You say she had told him her wishes; how do you know she had told him her wishes?

A. He informed us of that in the office.

Q. And did he suggest during that interview

(Testimony of Polan Banks.)

various terms should be incorporated in the contract?

A. Yes, he made various suggestions and objections.

Q. After April 29th, did you have any communications with Mr. Hickox in connection with this matter?

A. Do you mean after we were in the studio?

Q. Yes, after the contract had been made. [272]

A. Yes, I had a number of conversations with Mr. Hickox.

Q. What matters did you discuss with Mr. Hickox?

A. They were all minor things as to when Miss Sheridan was coming on the lot, when the picture would start, discussions as to the leading man, various small matters.

Q. At all times when Miss Sheridan came on the lot was it pursuant to some arrangement that had been made with Mr. Hickox? A. Yes.

Q. Mr. Hickox was always present at those discussions? A. Yes, he was.

Q. Did he express any opinion as to the availability or the capabilities of any of these actors who were suggested?

A. Yes, he did at various times.

Q. Did he offer any advice to Miss Sheridan in your presence with respect to what he thought of these different actors who were offered for the role?

A. Yes, I believe he did a couple of times just in general conversations.

(Testimony of Polan Banks.)

Q. As a matter of fact, Mr. Hickox always expressed himself to Miss Sheridan as to what he thought about these different people, didn't he?

A. Yes, he always spoke freely. [273]

Mr. Knupp: I think that is all, if the court please.

The Court: Now, you may step down, but remain in attendance pursuant to Mr. Knupp's request.

Mr. Gang: If it please the court, the plaintiff rests.

Mr. Knupp: I understand there is one other matter.

Mr. Gang: Yes. I did want to mention it. The resting is subject to Mr. Knupp's phone call.

Mr. Knupp: Before the plaintiff rests, I would like to, if I might, recall Miss Sheridan for just two or three questions.

Mr. Gang: I have no objection.

The Court: Miss Sheridan, will you return to the witness stand?

ANN SHERIDAN

called as a witness in her own behalf, having been previously sworn, was examined and testified further as follows:

Further Cross-Examination

By Mr. Knupp:

Q. Miss Sheridan, you know Andrew Hickox?

A. Yes, sir.

(Testimony of Ann Sheridan.)

Q. How long have you known him?

A. About 14 years.

Q. Has he represented you in any capacity during that period of time? [274]

A. Not represented me, no.

Q. Has he been employed by you?

A. Employed by me, yes.

Q. In what capacity has he been employed?

A. To make out my checks, to handle my insurance, things like that.

Q. He was employed as your business manager, wasn't he?

A. Yes, if that is what the term means, business manager.

Q. In connection with these appointments that you made at RKO when you were seeking to arrive at a conclusion as to a leading man, who made those appointments for you, generally speaking?

A. Sometimes Mr. Hickox, sometimes I did. If they couldn't get in touch with me they called him.

Q. And was Mr. Hickox present with you on all occasions when you went to the studio?

A. Yes, sir.

Q. Did you confer with him with respect to the suitability of these men who were proposed for the leading role?

A. If you mean was he in the conversations, yes.

Q. And did he express his opinion as to the suitability of these men? A. Yes.

Q. Mr. Hickox was paid, I assume, a regular monthly [275] salary for the services that he ren-

(Testimony of Ann Sheridan.)

dered to you? A. That's right.

Mr. Knupp: I think that is all.

Mr. Gang: No questions.

The Court: You got off easy, Miss Sheridan. That is all; step down.

Do you want to take another 15 minutes of testimony, or how long is the defendant's case going to take?

Mr. Knupp: Well, I imagine it will take a couple of days, if the court please. I think this other matter really involves the question whether Mr. Gang has completed his case or not, does it not?

Mr. Gang: I have completed it subject to your phone call.

Mr. Knupp: I mean the question of whether there may be an additional witness has to be determined, the one you want to call.

The Court: Couldn't he be called out of order?

Mr. Gang: If he is available it may be taken out of order.

The Court: Have you stipulated he may be taken out of order if he arrived?

Mr. Knupp: It is perfectly all right with me, if the court please, if that arrangement is satisfactory with Mr. Gang. [276]

Mr. Gang. It certainly is.

The Court: Well, then, I think that is the sensible way to handle that. So plaintiff rests?

Mr. Gang: Yes. [277]

No. 12927

United States
Court of Appeals
for the Ninth Circuit.

RKO RADIO PICTURES, INC., a Corporation,
Appellant,

vs.

ANN SHERIDAN,

Appellee.

and

ANN SHERIDAN,

Appellant,

vs.

RKO RADIO PICTURES, INC., a Corporation,
Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 305 to 627)

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Southern District of California,
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Appeals from the United States District Court,
Southern District of California,
Central Division.

Thursday, February 1, 1951—9:30 A.M.

(The following proceedings were had in the absence of the jury:)

The Court: Call the case.

The Clerk: No. 10585-C, Ann Sheridan v. RKO Radio Pictures, for further hearing on motion.

The Court: The record will show that this is out of the presence of the jury.

Mr. Rudin: Your Honor, I prepared an affidavit for the Chief Deputy United States Marshal. I just went up to see him, he read the affidavit and said the affidavit was correct, but he didn't feel that he should appear at a proceeding and file an affidavit unless the court directed him to do so.

He said if the court would call up there he would be glad to come down with Deputy Baugher, who was one of the deputies that tried to serve Mr. Hughes. I talked to him last night and talked to him this morning. That was just the position he took. He said he was an officer of the court and didn't see that he could file an affidavit unless the court said it was all right for him to do so.

Mr. Knupp: From my standpoint, if the court please, the facts set forth in these affidavits are entirely immaterial. I think before the court enters into any consideration of the question of whether or not he is going to instruct [285] the deputy to appear, we should endeavor to determine what the effects of the affidavits would be in the court's judgment.

The Court: All right. We will follow that pro-

cedure and determine whether it becomes necessary later to get the marshal down here, and either have him come down here and have him testify to the matters or have him sign an affidavit.

Mr. Knupp: That is my position.

Mr. Rudin: He took the position that the return on the subpoena was sufficient, and Mr. Henry has gone for that subpoena, which was filed.

The Court: What did you ascertain, Mr. Knupp, as to the whereabouts of Mr. Hughes?

Mr. Knupp: I know Mr. Hughes has been in Los Angeles, but because of his various engagements I can't say to the court that I know where Mr. Hughes is at this time. I can tell the court that I spent a great deal of time last night in an endeavor to arrange for the attendance of Mr. Hughes here, and that I will not know until late this afternoon whether those efforts are going to be successful. If it is possible for me to do anything within my power to produce Mr. Hughes here, he will be here the first thing tomorrow morning. I have done everything I can in that respect, if the court please.

I have some very definite ideas, if the court [286] please, with respect to this entire matter, however, that I would like to express to the court.

The Court: Have you anything else to present, Mr. Rudin, before we hear from Mr. Knupp?

Mr. Rudin: Your Honor, I think, has gone to the crux of the matter in his comment yesterday, when he pointed out that the rules were quite broad as to the rights under Rule 37(a), I believe it was,

concerning the failure of a person to appear for his deposition, even if that person was a non-resident of the jurisdiction.

I found about four decisions on that particular phase of the problem. The Ninth Circuit case I cited to your Honor, there is a Second Circuit case, and two decisions in 1 Fed. Rules Decis. I also would like to call your Honor's attention to the decision of the Second Circuit in *Arnstein v. Porter*, 154 Fed. 2d 464.

The Court: What does it hold?

Mr. Rudin: That case holds that although a deposition of an adverse party has been taken, the other party still has the right to call him as a witness, and points out that is a very important right.

The Court: Call him by a subpoena, I suppose.

Mr. Rudin: The case doesn't discuss it to that full extent. It just points out how important it is to give the party an opportunity to cross-examine. That is the only [287] reason.

The Court: I don't think that adds much to it. We all know that that is true.

Mr. Rudin: Other than that, I only say that besides the *Mammoth Oil* case by the Supreme Court, there are about seven or eight C.C.A. opinions and some District Court opinions as to the rule of law that a person's failure to appear as a witness raises a presumption that his testimony would be unfavorable, that it is a rule of law. Other than that I am unable to find any authority directly authorizing the court to order a party to appear in court, except that it might be inferred from the

court's general power as your Honor commented yesterday.

The Court: Mr. Knupp.

Mr. Knupp: I think it is very clear, if the court please, that these rules of Civil Procedure which govern proceedings in this court were designed to make it possible for the adverse party to secure any information that he might desire that was in the possession of one party. The rules provide, as the court is aware, first, for deposition, next for the serving of written interrogatories, requests for admissions as to certain facts, and are generally designed so that it is completely possible for one party to secure any information that is in the possession of the adverse party. In order that a party may have that right and that it may become [288] fully effective, these rules have provided some very severe penalties. I suppose in the councils of the United Nations, they would be referred to as sanctions. I refer to them simply as penalties for failure to comply with any provision of these rules with respect to appearing for a deposition or answering written interrogatories, or replying to a request for admissions as to facts.

The rules having specifically provided that these means shall all be available to the adverse party to discover all of the facts in the possession of his adversary, and having completely failed to make any provision with respect to inability to serve a subpoena, it seems to me that the rule-making party clearly had in view a provision such as would enable Mr. Gang in this instance to discover all of

the facts that were in our possession and to make such use of them as he desired. I think the court must clearly conclude that having provided with respect to these discovery proceedings that these penalties might be inflicted, and having significantly omitted any provision dealing with inability to serve a subpoena on a witness, it must have done so designedly, and I think the matter comes down to this, if the court please: that in such situation it becomes a matter of the effect of the failure of the adverse party to appear in the proceedings, and that, it seems to me, is a matter for the court to consider when it comes to the settlement of the instructions in this case, and that, I think, [289] insofar as I can see, is all that this situation results in. If one party has a witness that might presumptively have testimony which would be favorable to the party, and the party fails to appear, it may be the subject of some instruction by the court, whatever the court decides is proper under the circumstances, but I can't find anything, and counsel has cited nothing which would indicate that the court had any power to impose any penalties because of the failure of the witness to appear or the failure of the opposing party to serve him with a subpoena.

I come to the conclusion from a study of these provisions that the rule-making power having decided that the adverse party had been given full opportunity to ascertain all the facts—and in that connection, if the court please, it is rather significant that these rules provide that the taking of a deposition and notice requiring answers to inter-

rogatories, and the production of documents do not require any personal service upon the party at all, service in those respects may be made merely upon the attorney for the party, and then if the party fails to appear the court may still impose those penalties. So my position is, if the court please, from a study of those rules, that whatever the effect of the inability to serve a subpoena on Mr. Hughes in this case is, that it can only result in the court giving some instruction which may be unfavorable to the defendant in this case if the [290] court thinks that is the type of instruction that is justified, but I don't believe that there is anything in the rules or in any of the cases that would justify the court in taking any other action. And I do think if the situation which is here presented was within the contemplation of the rule-making power as the basis for further action by the court, that that matter would have been explicitly covered by the rules.

Your Honor knows, of course, that the question of the settlement of these rules, their formulation and their final approval by the Supreme Court, was made the basis of many years of discussion and argument by leading attorneys all over the country, and I suppose received considerable attention from the court before they were approved. But that is the situation as I see it, your Honor.

Mr. Rudin: I have nothing further to add, your Honor, that I haven't already said, except I would like to call your Honor's attention again to *Arnstein v. Porter*, which clearly points out that the

right to take depositions in the discovery process was not intended as a substitute for the right to cross-examine a party.

The Court: Isn't that what you just told me?

Mr. Rudin: That was all. I have nothing to add, but to emphasize Mr. Knupp's point that we have had full discovery process.

The Court: The clerk has presented the marshal's return [291] of non-service on the subpoena. It has been filed, Mr. Clerk, has it?

The Clerk: I just filed it, your Honor. Apparently it hadn't been filed.

The Court: The marshal says he received the subpoena on January 25th and returned it on January 30th.

Mr. Gang: That is not correct.

Mr. Rudin: That is not correct. We sent it down January 9th. There was a Deputy Marshal Baugher that worked on this for two or three weeks.

The Court: The subpoena is dated the 4th, January 4th.

You may have this withdrawn to get such amended return as you want, as you see fit, but I am not going to hold the matter up awaiting that. As far as your record is concerned, anything you want to do with that subpoena to get a proper return, you may do so, and withdraw the original from the file for the purpose of taking it back to the marshal and having him put on there what should properly be on there.

The matter now before the court consists, first, of a motion that the court order the defendant to

produce Howard Hughes as a witness; second, a notice or a request by the plaintiff requesting the defendant to produce Howard Hughes. I look upon that notice or request, although made orally, to have the same effect as a notice would have for the taking of a deposition, or any notice that would be given counsel in [292] the case.

I am going to grant the motion that the court order the defendant to produce Howard Hughes. That motion will be granted on the showing that has been made.

And even without the showing, it seems to me that a party, a plaintiff, should have the right to require a party defendant to be in court, or an executive officer of a defendant, for the trial of a case.

However, although I am granting that motion, I am very frank to say that I do not think there is very much I can do about it in the way of imposing penalties on that motion. Mr. Knupp has heretofore made, at pre-trial, a showing why he couldn't produce Mr. Hughes. He has also made a showing here this morning that he has done all that he as an attorney could reasonably do to get him here. I know Mr. Knupp's reputation and standing at the bar, and I give those showings full value. Accordingly, there will be no inclination by this court, I will say very frankly, to hold the defendant or anybody in contempt if Mr. Hughes does not show up.

Certainly I wouldn't feel inclined to hold Mr.

Hughes in contempt without some showing that he had some knowledge of the order of this court.

I am granting the motion, however, and directing the defendant to use all reasonable diligence to produce Howard Hughes as a witness. [293]

Now, as to the effect of the notice and request that Hughes be produced, as to whether that comes under the rules so as to allow the court to impose any of these penalties, I am not going to impose any of the penalties referred to in Rule 37 for two reasons. First of all, this matter of the appearance of Howard Hughes as a witness was not brought to the court's attention until the day before this trial started, at the last pre-trial conference of a series of pre-trial conferences.

Is that right, counsel?

Mr. Gang: That is correct, your Honor.

The Court: That is the first time the court knew that there was any problem about producing Hughes. Had the matter been brought up at a pre-trial conference seasonably, I have no doubt that what I would have done would have been to direct the defendant to have made Hughes available as a witness, and would have insisted that something like that be put in a pre-trial order, and would then have taken such proceedings as I saw fit if Hughes did not appear.

I think the request was made late, was not brought to the court's attention in time.

Secondly, although it is true that the taking of a deposition is no substitute for the appearance of a witness in court, it nevertheless is one fact that

has some bearing on this case. The rules, as Mr. Knupp points out, are for the [294] purpose of discovery. There was discovery; Hughes' deposition was taken. We therefore do not have as strong a situation as one where you had been attempting to serve a subpoena for a deposition, or get an interrogatory answered, or had been relying on the fact that without interrogatories or depositions you would have Hughes available as a witness for the trial of a case. The case, therefore, is not as strong as it might be under those circumstances.

Finally, although I am not going to impose any penalty under Rule 37, I am not so sure but what 37 is broad enough to permit the court, in a case that would properly appeal to a sense of justice, to impose those penalties in this kind of situation. It would be a drastic thing to do, but if the purpose of the rules is to require an adverse party to come in and give a deposition when you only give notice to his attorney, that is clear from the rules, and if notice is served on his attorney and he does not show up, the courts have dismissed law suits, and by the same token I take it a court could strike out an answer and render a judgment against a defendant who had answered. If the purpose of the rules is to bring a man in for a deposition for discovery, it seems to me it would be one of those situations where it is obvious that the discovery is only preliminary to the trial, and if the rules are broad enough to permit this matter prior to trial, it seems to me that the rules obviously intended that a [295] party would be produced or some executive of a

corporate defendant would be produced at the trial.

However, I think if that is the purpose of the rules it is a thing that should have been raised at pre-trial procedures. I think that the pre-trial procedure set up is broad enough to take care of those situations.

For instance, at a pre-trial supposing the plaintiff makes a request, "We want Howard Hughes produced as a witness in the trial of this action," and supposing the defendant gets technical and says, "Well, I don't find anything in the rules that requires me to produce my client or an official of my client," the court at the pre-trial still has obvious power to handle it. "Well, if you are going to be that way about it, Mr. Defendant, just serve a notice to take this man's deposition at a certain time and place, I will now fix a trial date and when he appears for the deposition slap a subpoena on him. If he doesn't appear at the deposition, I will strike the answer and grant a default judgment."

The court's hands are not tied if a request is seasonably made. But I think it would be a drastic step to take to grant that type of relief where the request is made the day before trial at the tail-end of pre-trial proceedings and where a showing has been made as it has by the defendants, and where had the request been made seasonably in pre-trial proceedings, counsel for the defendant would have had an opportunity to [296] have presented the dilemma that the defendant might find itself in to Mr. Hughes, in which event Mr. Hughes might have decided the better thing to do would be to appear for trial.

So much for what I am holding as I am. It seems to me, however, that in view of the fact that I am going to permit, if Mr. Hughes is not produced, some argument to the jury, and may give an instruction, it seems to me that the jury should be notified in some fashion of this proceeding. You can't just argue something to the jury without them knowing something about it. Here is what I have been thinking about. See what the two of you think about it. I think that either the court should summarize to the jury what has transpired, or we should have some of this in the presence of the jury. That is, Mr. Gang should make a request and a motion that Mr. Hughes be produced, that he is a material witness. In which event we could eliminate all argument as far as the law is concerned, whereupon Mr. Knupp may make such explanation to the jury as he wants to. For instance, the showings he has made as to how busy Mr. Hughes is, and how hard it is to try to locate him. It is up to you. And I would propose to advise the jury that I granted the motion to produce him, and that I directed the defendant to make a reasonably diligent effort to produce him. Then I think we would have something in the record where any [297] argument to the jury would make some sense.

I think the jury is entitled to know that there is a claim by the plaintiff that Hughes is material, and by the same token, I think the jury is entitled to have the explanation of the defendant, the explanation of the defendant or his counsel, as to why the witness is not produced.

If agreeable to you that could be done by just an attorney's statement, or if Mr. Gang insists—I don't think he would, but you might conceivably argue that the statements should be under oath as a witness testifying before a jury. I think a gentleman of your standing could take counsel's word for the showing.

Mr. Gang: May I be heard a moment?

The Court: Yes.

Mr. Gang: I have a little concern about this portion of the procedure, and I might state that I would not under the circumstances differ if I were in your position with the feeling about sanctions or penalties, as an officer of the court, and therefore my statements are not in disagreement with your ultimate decision in that capacity. However, I do want to state, in line with the discussion we are just having, that our problem here is not one in which we delayed unreasonably. Your Honor must remember that the marshal had this in his hands for three weeks, and he was talking to Mr. Hastings, who was going to arrange, if he could, for [298] it to be served. So those three weeks passed without us having an opportunity to do anything except wait for the marshal to complete his negotiations. Only after the marshal gave up—about the week before the trial date we were informed of the fact that he had given up. We then engaged detectives, and in addition to that tried to get counsel, in the usual informal manner, to agree to produce Mr. Hughes.

The Court: Yes, but at no time during the pre-

trial procedures did you say to me as the judge, "We want to have Mr. Hughes present as a witness, can we make some arrangement for that?"

Mr. Gang: If I may say so, I think it would have been unfair to counsel for the other side, as long as they at that time, up to a week before, had had no offer for them to do it, to give them an opportunity; and as you know, we were pretty busy with pre-trials then.

I want your Honor to know that if we have to tell the jury things like that, we are going to read the article in *Variety* showing that Mr. Hughes was here having a financial conference at RKO on Tuesday. If you are going to get into those collateral issues with the jury, I don't know whether it is going to be good or bad insofar as it concerns me. In Mr. Knupp's explanation he would say he has war work, and we would have to read the article in *Variety*.

The Court: Let me interrupt you a minute. What about [299] this as an alternative? By stipulation of the parties let me make a short statement to the jury to the effect that the plaintiff, Ann Sheridan, in this case has made a motion and made a request that Mr. Hughes be present as a witness and available at the trial of this action; that Mr. Knupp has made a showing that he has done everything within his power to secure the attendance of Mr. Hughes; that Mr. Hughes is a very busy man, has a number of corporations, some of which are in defense work, and Mr. Knupp doesn't know whether he can produce Mr. Hughes or not, but as

far as he can, as an attorney, he will try to produce him, but he makes no guarantee that he can. That is in substance Mr. Knupp's showing. Then merely drop the matter at that stage without anything further for the jury.

Mr. Gang: You might prejudice plaintiff, because you drop in the "defense work" item and you omit the item that he was here Tuesday on RKO financial business.

The Court: What difference does it make where he is? As I read this case you cited, *Collins v. Wayland*, he was a resident of Oregon who went down and sued in Arizona.

Mr. Gang: What concerns me is leaving the jury with the idea that he is not here, because he is so busy on defense work, when the record shows he was here Tuesday on picture business. That is the only concern I have, your Honor. I don't want to influence the jury one way or the [300] other, but I don't want any nuggets about defense work dropped and omitting the other item that he was here on Tuesday about the picture business. I don't like the idea of throwing in the idea about defense work. While he is doing that, he is also doing picture work.

The Court: You are either going to have to let the defendant make a showing by a statement to the jury, let him put on evidence before the jury, or you are going to have to let the court repeat what his showing is, because the whole theory of this business that you can comment to a jury or instruct a jury about the non-production of a wit-

ness rests upon the theory that the defendant could produce this witness, that it is within their power to produce him. Now, *prima facie*, it is within their power, because he is an officer. That is your showing, that is all you have to make. Now, you certainly can't cut the defendant off from his opportunity to make a showing that it is not within his power to produce him.

Mr. Knupp has probably said everything that a good lawyer can say in that respect.

Mr. Gang: What about us, your Honor, with the showing we can make that he was here Tuesday on picture business?

The point I want to make is I don't want to stop him or the jury from knowing what efforts he has made, and I agree with you that Mr. Knupp has done everything he possibly [301] can do as an officer of the court, but I don't want a statement to the jury which leaves them with the impression that Mr. Hughes is engaged only in patriotic war work, when the fact is he was here Tuesday doing picture business in Hollywood at the Beverly Hills Hotel. I don't want the jury not to know that if it knows the other. I have no objection if it knows both.

The Court: Maybe Mr. Knupp will come up with some idea that will solve this.

Mr. Knupp: I would suggest, if the court please, at this point, as I assume that the court probably wouldn't want to make any statement to the jury until it came time to instruct the jury with respect to the general law in the case, that we wait to

determine whether Mr. Hughes is going to be here or not.

The Court: That is true. I think we can well wait. You said tomorrow morning?

Mr. Knupp: We will know tonight whether it is going to be possible.

The Court: I don't see any sense in doing anything until after tomorrow morning. But if he doesn't arrive tomorrow by the morning session, then what is your suggestion as to what the court do?

Mr. Knupp: Then I think the court should make some statement such as has been suggested by the court. I don't [302] think the situation with respect to Mr. Hughes is any different than it is with respect to the business manager of the plaintiff in this case, as far as we are concerned.

Mr. Gang: You can have him. He is available on telephone call.

Mr. Knupp: That is not my proposition. The question is you have the man who is the business manager of the plaintiff, and he isn't produced here. We have as much right to comment on that as you have on the fact that Mr. Hughes——

Mr. Gang: I will argue that at the proper time.

The Court: There is a difference, in view of Mr. Gang's statement that he would have him available if you want him.

Mr. Gang: He is available.

Mr. Knupp: We don't have to call an adverse witness, if the court please, just because he is available. We don't foreclose our right to comment on

the fact that he is not here simply because we don't put him on the stand. While I appreciate the court is going to say to the jury, "This man is an adverse witness and the defendant is not bound by his testimony," certainly there is no rule of law that requires us to call an adverse witness and put him on the stand so the jury may hear what he has to say.

Mr. Gang: This is no time for that argument. This is not a subject of discussion.

Mr. Knupp: We are off on another point. [303]

The Court: Mr. Knupp, I was reading *Corpus Juris Secundum*, that great volume of confusion, this morning and in the very last portion, I think, of Section 156 under the title "Evidence," there is on page 853, subsection c, "Failure to call or examine witnesses," and apparently the rule may not apply to corroborating witnesses.

Hickox would be a corroborating witness of the plaintiff. There is some definite question as to whether you can comment on the failure to call a corroborating witness.

Mr. Knupp: Of course, if the court please, from our standpoint Mr. Hughes could only be a corroborating witness in this case. I don't know. Your Honor suggested yesterday that there may have been a lot of things that Mr. Hughes knew that wouldn't be testified to by Mr. Rogell or Mr. Sparks; I think there are a lot of things that this witness may testify to, if he were called, that was not testified to by Miss Sheridan. I don't think there is any difference in the situation, frankly, your Honor.

The Court: Mr. Knupp, your contention that he would only be a corroborating witness would be correct, except for one point, and that is that he is an officer, an executive of the defendant, which in substance makes him almost a party. A corporation can only act through its officers, and he therefore is taken out of the class of an ordinary witness. He is a party to this litigation, he is an officer [304] of a party. He is a party in the sense that he is one of the people through whom the defendant operates. I think that changes the picture entirely. If he were only a witness, not in the employ of the defendant, then obviously he would be available to either party. It is the fact that he is in your employ, the fact that he is subject to the orders of the defendant, the fact that he is an executive of the defendant, that makes the difference.

Mr. Knupp: I suggest to your Honor that Mr. Hickox is in the employ of Miss Sheridan, is receiving a monthly salary from her for services which he is rendering for her. Your Honor's ruling is final with me.

The Court: And he shall be available. If there is any doubt in your mind, I will direct Mr. Gang right now to have him here at any time you want him.

Mr. Gang: I have offered to produce him.

Mr. Knupp: I am not going to call and examine, if the court please, anyone who is in the employ of Miss Sheridan, just because Mr. Gang offers me the opportunity. I have no doubt that he would be delighted if I do it. But I don't intend to do that,

and I don't think the law obligates me to do it.

And the question whether I get any instruction from the court in that respect, or whether I am allowed to comment on it to the jury, of course, is a matter that your Honor will [305] decide.

The Court: The matter we have talked about, we might as well decide it. As I see your point, you contend Hickox would be a corroborating witness for Miss Sheridan since he was present at some of these meetings?

Mr. Knupp: I contend more than that, if the court please. I contend, apparently something developed yesterday to indicate that there were some statements or declarations made by Mr. Hickox to which Miss Sheridan says she wasn't a party. I contend his testimony goes further than that. We certainly shall urge that as her business manager, his declarations or statements, even made without her presence, are admissible.

It brings up a point of law, of course, that hasn't been discussed so far in this case.

The Court: You were only stopped on the scope of cross-examination. You still had the alternative to bring Hickox in as your own witness, or you had the alternative of making the witness Banks, I believe it is, your witness.

Mr. Knupp: That's right.

The Court: But you didn't avail yourself of that.

Mr. Knupp: Yes, I think I said to your Honor that I expected to make Mr. Banks my witness. I expect to put him on the stand.

The Court: You mean later on?

Mr. Knupp: Yes. [306]

The Court: All right. I didn't understand you.

The point is when you were stopped on cross-examination you had the alternative of making him your witness, and I recall now that you elected not to make him your witness on that occasion, but you said you were going to call him later.

Mr. Knupp: That is correct, if the court please.

The Court: We might as well call the jury down.

Mr. Knupp: Before the jury is called, we would like to make a motion in this connection, if we may. At this time, if the court please, the plaintiff in the case having rested, the defendant now moves that the court instruct a verdict on the complaint in favor of the defendant and against the plaintiff upon the ground that there is no sufficient evidence to sustain the allegations of the complaint in two respects: In the first place, it appears clear from the record that the plaintiff had never up to the time that the contract was terminated approved any actor to portray the leading male role in "Carriage Entrance," and under the contract itself it was provided that if she did not approve an actor for that role she was not entitled to receive any compensation. Secondly, that it appears she was repeatedly offered an opportunity to approve an actor for the male role and she refused her approval in each instance. And, in the third place, the evidence on the part of the plaintiff so far offered does not in any way [307] indicate that the persons who were designated as the persons to take the lead in this

picture were not actors who were competent and qualified for the part. For all of these reasons we suggest to the court that at this point there is no evidence which would sustain a verdict in favor of the plaintiff in this case.

The Court: I am going to deny the motion.

I don't think it needs any comment except that on this kind of a motion you must take the evidence most favorable to the plaintiff's position. The evidence looked at most favorably, on your first point, would be that she did originally approve Robert Young at a time when there was at least a thought on the part of the defendant that Young would be available. Furthermore, as far as your other points are concerned, there is no evidence that the defendant ever actually designated a substitute in the technical sense of the word in place of Young.

Don't let that perturb you too much. I think on this kind of a motion I may look at that particular point. However, as far as the case is concerned, my present intention is to instruct the jury that it doesn't make a lot of difference whether there was a physical designation or not, that under this contract the parties had to eventually agree, however you want to phrase it, on who this male actor should be, because of the right given to the studio to suggest a name [308] and the right given to Miss Sheridan to reject it. But looked at from the standpoint of your motion, there has never been any actual designation by the defendant of anybody to take Young's part.

The motion will be denied.

Mr. Gang: May we have a moment's recess before we go ahead?

The Court: Very well. A short recess.

(A recess was taken.)

(The following proceedings were had in the presence of the jury:)

The Court: The record will show that the jury is present and in their proper places in the box.

Mr. Gang: So stipulated.

Mr. Knupp: So stipulated. May we proceed?

The Court: You may proceed.

Mr. Knupp: Mr. Sparks.

ROBERT SPARKS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Robert Sparks. [309]

Direct Examination

By Mr. Knupp:

Q. Where do you reside, Mr. Sparks?

A. In Van Nuys.

Q. What is your business or occupation?

A. I am a producer with RKO Pictures.

Q. That is the defendant in this action?

A. Yes, sir.

Q. What experience have you had in connection

(Testimony of Robert Sparks.)

with the production of motion pictures? Will you tell us generally?

A. I have been in Hollywood and actively in the motion picture industry since 1932, with the exception of 26 months while I was in the Marine Corps.

Q. I think your voice is a little bit too low, Mr. Sparks. Maybe it is the acoustics, but it is rather difficult to hear, and I imagine the jury may have the same trouble.

A. I will speak louder.

Q. During that period of time in what sort of work in connection with motion pictures have you engaged?

A. I have been a story editor, I have been on story boards, I have been executive producer, and a producer.

Q. For what companies have you worked?

A. For Paramount, for Samuel Goldwyn, for Fox, Universal, and for RKO. [310]

Q. And you have been continuously employed, I think you said, since about 1932?

A. '32, yes, sir.

Q. How long have you been employed by the defendant RKO Radio Pictures, Inc.?

A. Since 1945.

Q. And how long have you been employed in the present position which you occupy?

A. The same period.

Q. Will you state to the jury generally, Mr. Sparks, what your duties as a producer at RKO consist of, what do you do?

A. The producer selects the story, chooses the

(Testimony of Robert Sparks.)

writer, supervises the preparation of the script, selects the cast——

Q. I don't know that the jury knows just what you refer to by the script. Will you explain the process by which the literary medium which is translated to the screen is prepared?

A. We take a story, as in the instance of "Carriage Entrance," which was a novel—this is sometimes a novel, sometimes it is only an idea, sometimes it is a short story either published or unpublished, and we try to organize and regiment that into some screen play form.

Q. And the screen play contains the direction as to the action as well as to the thread of the [311] story?

A. Yes, sir.

Q. I think I interrupted you when you were discussing the nature of the duties that you performed as a producer.

A. No, I think I had completed with the possible exception of that which happens after the picture has been produced, which is concerned with the cutting, the dubbing, the scoring, meaning the music, and the preparation of the picture for its release print.

Q. With respect to the selection of a cast of actors to perform in the picture, do you perform any function in that respect?

A.. Yes.

Q. What do you do in that respect, Mr. Sparks?

A. Well, through our own knowledge of actors, I am speaking of producers generally, through our own knowledge of actors we assign various people

(Testimony of Robert Sparks.)

who are in the business of acting in pictures, we make out a cast list for the various characters in the picture, in the screen play, we have perhaps as a producer our own ideas about who should play this; the casting department also has their own ideas, and you get a list from them; you get suggestions from agents who may know something about the story property or the scripts, and you also, from the various other executive heads in the studio, get suggestions. These are all compiled. We get it down to possibly two, three, four, five [312] names, and then from the standpoint of policy within the studio normally this would go to the head of the sales department; in the instance of RKO it is Mr. Depinet, who is also president of RKO, and Mr. Depinet would make his analysis as to how this cast might appeal from the standpoint of being able to sell it to exhibitors. Based upon his opinions, the opinions of the heads of the studio, the opinions of the producer, we finally assemble a cast and begin shooting.

Q. The ultimate purpose being, I assume, to have a picture produced which will have a box office value commensurate with its cost to the studio?

A. That is the great problem, Mr. Knupp.

Q. In regard to "Carriage Entrance," Mr. Sparks, when were you first brought into the situation with respect to production of that picture?

A. Well, it was the latter part of April, 1949, I guess.

(Testimony of Robert Sparks.)

Q. And how were you brought into the production?

A. Well, one afternoon I got a call from Mr. Rogell to come to his office, and in Mr. Rogell's office I found then the members of the board that were acting in the executive capacity within the studio.

Q. I think I ought to say to you, Mr. Sparks, that here you will not be permitted to testify to any conversations [313] that you may have had with anybody except the plaintiff or her representative, so that any of your discussions with these officers of RKO will not be permitted, you will have to bear that in mind to testify.

A. Then how may I answer your question?

Q. You can testify generally what you were assigned to do, I think, without any objection.

The Court: What you did.

The Witness: The result of this was that I was informed that the studio had accepted a package from Polan Banks Productions; it consisted of a script based on a novel called "Carriage Entrance," it consisted of Ann Sheridan as leading lady, Robert Young as the leading man, and there was a contractual obligation that made it necessary that Mr. Banks appear on the picture as producer. And because of my long association with RKO there was a feeling that Mr. Banks needed someone to act as a liaison and to sort of keep him out of trouble, which is very easy for a new producer to get into in a studio that he does not know——

(Testimony of Robert Sparks.)

Q. (By Mr. Knupp): Do you mean to say that experienced producers never get into any trouble?

A. They get into plenty. But inexperienced ones can get into even more.

Q. At the time, then, that you were brought into the picture, it appeared as though——. Withdraw that. [314]

At the time that you were brought into the situation it appeared as though the picture was ready to be made? A. That was true.

Q. What was your first duty in connection with the production of the picture, Mr. Sparks?

A. My first duty was to read the script. I found that it was not a complete screen play. It was possibly two-thirds of a screen play.

Q. Can you tell us, Mr. Sparks, at this point—the jury might be interested—in a brief narrative what the story was that you were going to make the picture from? A. Well, this story was——

Q. I imagine the jury enjoys a story.

A. I don't want to do anything here that may keep them out of the theatre, either.

This was a story of a Creole girl in New Orleans. This girl's grandmother had been a prostitute. The situation with her immediate family, which consisted of her aunt and her cousin—they were on the fringe of being wealthy, their hope was that this girl would marry a wealthy man who was one of the characters in the story. The girl, however, is in love with a professor at the university, and the progression is that of the struggle of the girl

(Testimony of Robert Sparks.)

between the factors that tried to keep throwing her background between her and her romance, and how this resolves itself in the [315] final unity of the professor and the girl.

That, very badly, is the story.

Q. And the girl in the story was the part which was to be assigned to Miss Sheridan?

A. That's true.

Q. And the professor in the story was Mark Lucas, the part which was originally intended for Robert Young?

A. Yes. The part was then called Quentin, I believe.

Q. But later his name was changed to Mark Lucas? A. Yes, Mark Lucas.

Q. And the cousin of the girl was the part assigned to Melvyn Douglas? A. That is true.

Q. I interrupted you when you were stating what you first did in connection with this production.

A. Well, there was no completed screen play on this.

Q. What was the situation in that respect?

A. Leopold Atlas had apparently been engaged by Mr. Banks to write a screen play, and somewhere along in the writing of it he had run out of dialogue, and the latter third of the script was told in narrative form, and there were certain factors in the narrative form which were not admissible to the production code, having to do with the standard of morals, which we must have in pictures, so that the

(Testimony of Robert Sparks.)

script itself was a considerable problem at the beginning. [316]

When I told Mr. Banks this, he then gave me a script which was completed, but which the latter part of it had been finished by himself, and Mr. Banks, not being a screen play writer, it didn't improve the quality of it any. So the first task was to try to get this screen play into some sort of form so it might be shot and made into a picture, and to that point we engaged a writer, Marion Parsonnet. Mr. Parsonnet was approved by Mr. Rogell, who was the executive producer of the studio, and by Mr. Banks.

Q. I think Mr. Banks testified that he worked with Mr. Parsonnet in the revision of this script, is that true?

A. Yes, they went away for three weeks to write on this script.

Q. Do you recall, starting with April 29th, about when it was that their efforts were finished and the script was in final form or budget form, at least?

A. Well, they came back in about three weeks. In the meantime Robert Stevenson had been assigned as director, as I recall it, and they presented—Mr. Banks having the prerogatives of a producer, they presented a script to Mr. Stevenson and myself, and we both found a number of faults with it, and then Mr. Stevenson, myself and Mr. Banks worked with Mr. Parsonnet, and I think we had a first—what we call a first draft of our draft, not actually the first draft, because in draft numbers

(Testimony of Robert Sparks.)

this would have been the third draft, [317] but actually for studio purposes and within the studio this became the first draft of "Carriage Entrance," and I think that was out of the mimeographing department around the 7th of July.

Q. What was your particular problem in connection with the script, Mr. Sparks, if there was a particular problem, with relation to the characters that you were trying to develop?

A. Well, there was quite a problem with respect to the professor, because from a literary sense there was an inference in the script, in the novel, that there was a rather esthete quality to this professor; this professor was to be the leading man, and from the standpoint of what we term sex in pictures we had to do a great deal to try to make that character a little more virile than he was in the original version. There was also the question of certain censorship problems with respect to the picture, because this touched on a subject that is not too often put on the screen, and there had to be a certain amount of taste used in trying to present this in such a way that it would not be in any way offensive.

Q. When the script was revised, what in your judgment was the result of the revision as far as the character of Mark Lucas, the professor, was concerned?

A. Well, I think he came out a very strong and very [318] attractive character.

Q. So that the revision of the script resulted in that being a more desirable part to play in the pic-

(Testimony of Robert Sparks.)

ture? A. To my way of thinking, yes.

Q. When did you first meet the plaintiff, Miss Sheridan, in connection with this picture?

A. Miss Sheridan, I think, came to the studio around the 5th, I believe it was the 5th; it was after the 4th, I think the day after the 4th of July.

Q. Were you there at the luncheon which was given for Miss Sheridan, which she mentioned as being a welcoming sort of affair?

A. Yes; Miss Sheridan and Mr. Hickox, whom Miss Sheridan introduced to me as her business manager, and Mr. Banks, came to my office before we went to lunch, and we went to the lunch.

Q. You knew Miss Sheridan before this, did you?

A. Yes, I have known Miss Sheridan since she came from Dallas many years ago.

Q. Did you know Mr. Andrew Hickox before this? A. No, I had never met him before.

Q. Who introduced him to you?

A. I believe Miss Sheridan did.

Q. What did she say that he was, if anything, at the time she introduced him? [319]

A. Her business manager.

Q. Did you have any conversation with Miss Sheridan on the occasion of this first visit with respect to the leading man role in the picture?

A. Mr. Knopp, I don't believe so. I think it is normally a practice that when a player who has not been on a lot—that doesn't apply alone to RKO, but there is always a little interlude of social mat-

(Testimony of Robert Sparks.)

ters before we get down to sparring about the questions of cast and other things, and the occasion of this luncheon was merely to welcome Miss Sheridan on the lot. I think we talked only in generalities, and there was nothing specific, because it appeared from the status of the package that it was practically ready to begin production, and was not concerned with any problems.

Q. Did you attend some meeting at which Miss Sheridan was present, at which the question of the designation of certain people as a hairdresser, or wardrobe woman, or make-up woman was discussed?

A. Yes, that could have been at this luncheon; those are purely routine matters, because a star of Miss Sheridan's dimension generally has those persons in the hairdressing, makeup, and wardrobe department that they like, and they go with them from picture to picture, and Miss Sheridan gave us the names of those persons and I told her they would be engaged by the studio, and they subsequently were. [320]

Q. As I understand it, Mr. Travilla was designated by Miss Sheridan as the designer of her costumes in this picture?

A. He was, yes.

Q. Mr. Travilla was the choice of Miss Sheridan, was he?

A. Yes, we borrowed him from 20th Century-Fox for the picture.

Q. You had to get him from outside in order to comply with her request that he should be employed, is that true?

A. That is true.

(Testimony of Robert Sparks.)

Q. When did you ascertain, Mr. Sparks, that Mr. Young had refused to approve this part in the picture?

A. I think Mr. Banks advised me of this somewhere around the 9th or 10th of July.

Q. I can tell you, Mr. Sparks, from the record that the script was submitted to Mr. Young's agent on July 7th, and the refusal in writing from Mr. Young was received by the studio on July 12th. Does that indicate to you when, possibly, you first heard this?

A. Yes, it does. Mr. Banks had the same agent that Mr. Young had, being Nat Goldstone, and Polan brought me word from the Nat Goldstone office that Young had turned down or intended to turn down the part, before any official letter came to the studio. [321]

Q. But it was after the script had been sent to Goldstone's office?

A. A very short time after, yes.

Q. So it must have been between the 7th and 12th of July? A. That's right.

Q. When you learned of this situation did you make any attempt to persuade Mr. Young to change his mind?

A. Well, I made an attempt to get hold of Mr. Young, because I could not understand if he had approved the original, which was an incomplete script, in which the character was not at all an attractive character, I couldn't understand what his reasons were for turning down this script, which in all of our estimations was a much better script,

(Testimony of Robert Sparks.)

and I was unable to get hold of Mr. Young because he had some time around the 4th of July gone up north, I think, to Carmel or some place, and I couldn't reach him, or apparently his agent couldn't reach him in a way that I might sit down and talk with him, because it was rather unusual for a star of Mr. Young's position to turn down a part and not allow the producer some rebuttal, or not allow the producer or those concerned with the production of the picture to ascertain exactly what his objections were, and if they were at all amenable to any kind of fixing, to allow us an opportunity to fix or to change or to alter the script. [322] But at no time was I able to get hold of Mr. Young, and in fact his agent finally told me that he had just completed a picture at Columbia, that he was now engaged in getting together a radio program, which is on the air now, called "Father Knows Best," and that his feeling was that there was no need of talking to Mr. Young, because he apparently—in fact, I never could find any evidence that Mr. Young had actually agreed, at least I could find nothing in writing that he ever had agreed to do this part.

Q. With respect to approval of the original script or the story itself, you mean? A. No.

Q. As a result of whatever efforts you made, Mr. Young eventually did absolutely refuse to perform the role?

A. I presume he did. Since this was a package deal, and since both Miss Sheridan and Mr. Banks

(Testimony of Robert Sparks.)

stood in the way of participating in the profits of the picture, I even appeal to them that they make some effort to try to find out what had happened to their man, and why he had changed his mind; and apparently they were not successful in contacting him.

Q. Did you discuss that question with Miss Sheridan? A. I did.

Q. When did you discuss it with her?

A. I think it was probably somewhere around the 11th. [323]

Q. Probably the first meeting you had with Miss Sheridan after you learned that Mr. Young would not perform the role?

A. I am not quite clear about that, Mr. Knupp.

Q. I don't expect you to remember the date, but relatively?

A. It seems that would follow, yes.

Q. Will you tell us what was said in that discussion between you and Miss Sheridan about this matter?

A. Well, Mr. Hickox was also present, and I don't know what was said, apparently nothing constructive, because nothing occurred to change the situation.

Q. When did you start your efforts, then, to secure somebody to take Mr. Young's place?

A. I think this must have happened sometime after the official notice had been received by the studio that Mr. Young would not play the part; in fact, I think that Polan began to assemble names

(Testimony of Robert Sparks.)

even prior to that time, because he had been in contact with Goldstone, and I presume that he felt that this was impossible insofar as Mr. Young was concerned, so we began then making out a list of possible people to play this part.

Q. And this, you think, must have been shortly after July 12th? A. Yes, I think so. [324]

Q. Had you determined at that time, Mr. Sparks, about how long it would take to produce this picture?

A. Do you mean in shooting schedule?

Q. Yes, in shooting schedule.

A. No, I don't think so at this time.

Q. Will you tell us, if you had conversations with Miss Sheridan about this matter of a substitute for Mr. Young, will you tell us approximately when the first of these meetings occurred?

A. Well, it was somewhere around the 12th, I would say.

Q. Where did it occur? A. My office.

Q. Who was present?

A. Mr. Banks, Mr. Stevenson, Miss Sheridan, and Mr. Hickox.

Q. Will you tell us what was said by the various parties present at that conference?

A. Well, I can answer that only in general, Mr. Knupp. We have in the motion picture industry a booklet that is put out by the motion picture industry which contains the pictures and either agency or phone number where you can reach the players,

(Testimony of Robert Sparks.)

and we began an exhaustive search through this to try to find a leading man.

Q. Do you recall whether the names of Mr. Ryan or Mr. [325] Ferrer were discussed at that meeting?

A. Well, we have under contract at RKO both Mr. Ryan and Mr. Ferrer, and I think from the very beginning that it had been indicated to me by Mr. Rogell, when it became common knowledge that Mr. Young was not going to do this part, that either or both of these two players, Mr. Ryan or Mr. Ferrer, would be available for the picture.

Q. What in your judgment was the suitability of either or both of these two men for this role?

A. Well, I think of the two Mr. Ryan is by far the best, although Mr. Ferrer is a fine actor, and probably could have given a very excellent performance of it. Of the two men, my preference was always Robert Ryan.

Q. What did you think about Mr. Ryan in the part of this role?

A. I thought he would be fine.

Q. Did you feel that he would have, in combination with Miss Sheridan, made a successful picture?

A. I am certain they would have.

Q. Did you discuss these matters with Miss Sheridan at this first meeting, about Ryan and Ferrer?

A. At that time I was making another picture, "Bed of Roses," with Joan Fontaine, and I had both Mr. Ferrer and Mr. Ryan in that picture, and

(Testimony of Robert Sparks.)

I believe that it was right around this time that one day in the dailies there was a short scene, [326] a couple of hundred feet in which both of these actors appeared, and I believe at this first meeting or at one of our early meetings with respect to the cast, I took Miss Sheridan, Mr. Hickox and Mr. Banks and we went to the projection room and I ran this, what we call a rough daily scene. This is a scene just as it is shot on the set and before it has been cut, or before there have been close-ups and the other things that we do before we edit a picture. And I showed both of them these takes. There were probably two or three takes of the same scene.

Q. Did Miss Sheridan or Mr. Hickox express any reaction to what they saw in the film?

A. They felt that they weren't right for it.

Q. What did Miss Sheridan say in that respect?

A. I think she said she didn't like either man.

Q. And did Mr. Hickox say anything?

A. He didn't like either man, either.

Q. Did you at any time either at this discussion or any of the discussions that you had with Miss Sheridan, or Mr. Hickox, ever express any opinion that Mr. Ryan was not right for the role?

A. No. I may have expressed an opinion that I felt that Mr. Ryan was far more suitable or was better suited than Mr. Ferrer, but I don't think that I could have said that either of them was unsuitable for the role. [327]

Q. After you had shown this film to Mr. Hickox and Miss Sheridan, "Bed of Roses," in which

(Testimony of Robert Sparks.)

Ferrer and Ryan appeared, did you then have some further discussions at a later date about the matter of securing a leading man in this picture?

A. Well, at this point it seemed Miss Sheridan had been in Europe for some months, and I had a feeling that she had not seen some of the recent pictures and had not—because there were some names of what we call the up and coming leading men that she didn't seem to be familiar with their names or faces, and I made the suggestion to her that we have at RKO 16-millimeter prints of pictures, and we can get 16-millimeter prints from other studios.

Q. You mean prints that some of these younger men that you thought were suitable for the picture had appeared in?

A. Not necessarily younger men, but new to the picture industry, men who came up. And I offered to send a projection machine and to supply Miss Sheridan with as many films as I could get, and she could run these in her home. And she told me at that time that she was having her house remodeled and had no place to run these pictures. Then I suggested that we get in some pictures from the outside and look at them. And with one thing and another we never got around to that. [328]

Q. What did Miss Sheridan say when you suggested that you would get in some pictures from the outside to show them at the studio?

A. Well, I believe she said that she hadn't seen anything that—any person that she wanted to see in a picture.

(Testimony of Robert Sparks.)

Q. Do you recall that the name of John Lund was mentioned during these discussions?

A. Yes, he was.

Q. Do you know what Miss Sheridan or Mr. Hickox said with respect to him?

A. If I remember correctly, Miss Sheridan had never seen Mr. Lund on the screen and her first reaction to him was an adverse one. I think either after I or Polan had told her something about Lund she seemed to get a little interested in him, and then the next thing I had ascertained, since Mr. Lund is under contract to Paramount, not RKO, was if Mr. Lund would be available. I think this matter was turned over to Mr. Schuessler, and I think some time later Lund was not available because he had been assigned to another picture.

Q. Did you at some time subsequent to the showing of this film, "Bed of Roses," arrange to show Miss Sheridan some other film at the studio?

A. No. Mr. Rogell arranged it. I did not arrange any. [329]

Q. Do you know what it was that was shown?

A. I think it was another scene from "Bed of Roses." I think, also, there was "The Macomber Affair"; there was a picture that had been made at the studio called "Blood on the Moon."

Q. Who appeared in that picture?

A. Robert Preston. I don't recall. There were two or three other pictures that at least were on the list.

Q. Did Miss Sheridan make any comment to

(Testimony of Robert Sparks.)

you with respect to Robert Preston?

A. She said she didn't think he was right for it.

Q. Did she say what her reason was for not thinking he was right?

A. No, I don't know that she gave any specific reason, but she said she just didn't like him for the part.

Q. Do you recall having a conversation with Miss Sheridan after she had seen the picture "Lost Boundaries" in which Ferrer appeared, I mean a conversation with respect to his use in the picture as leading man?

A. Well, that was a running that was arranged by Mr. Rogell, and I think Miss Sheridan's comment was that he was a very fine actor, that she enjoyed the picture, but she didn't think he was right for the part.

Q. Did she say why she didn't think he was right for the part? [330]

A. No.

Q. Did she in any of these discussions with you in which she said that an actor wasn't right for the part explain what the basis for her statement was, or what her reasons were for not thinking that he was right?

A. I can't recall what reasons there were, Mr. Knupp.

Q. Do you recall whether she assigned any reasons at all in any of these discussions with you as to why she didn't think an actor was right for the part?

(Testimony of Robert Sparks.)

A. I don't think she went into it very extensively.

Q. When did the name of Franchot Tone come into your discussions, Mr. Sparks?

A. It was at one of these meetings during the afternoon we were discussing actors, and Miss Sheridan said something about Doc Tone, and I asked her if she knew Doc, and she said she knew him quite well. I said, "He is on the lot," because he was at that time editing a picture that he had made in Paris, called "The Man on the Eiffel Tower." I said, "Would you like to talk to Tone if I could get him down here?" And she said she would very much. So I called around and I think he was up on the dubbing stage, and some 10 or 15 minutes later he arrived, and we sat around in the office and talked.

Q. Then, what did Miss Sheridan say with respect to Tone? [331]

A. She said, after Tone had left the office, she turned to me and said, "Doc is my man." And I said, "That's fine, that is something that we will have to take up with Rogell and let him take it up and see how they react to it. If you like Tone for this I certainly shall submit him." So the following morning I did, to Mr. Rogell.

Q. What was the result?

A. Well, Mr. Rogell wasn't very impressed with it. He made a comment which was that he was getting a little tired of these delays, and the fact that Miss Sheridan was wearing him down to the point

(Testimony of Robert Sparks.)

that if he had his way he would accept Mickey Mouse, but he said that he would take the matter up with Mr. Hughes and see what Mr. Hughes' reaction was.

He subsequently told me that Mr. Hughes did not react well to the name of Franchot Tone, but had asked Mr. Rogell to phone Mr. Depinet in New York and see what Depinet felt about it; that he had phoned Depinet and Depinet reacted very adversely to it, and told Mr. Rogell that this is a costume picture, which is not a very salable piece of film anyway, and that he needed every cast asset that he possibly could have to help him in the sale of it, and to ask us to please not put Tone in the picture, but to try to get someone with a little fresher value than Tone had.

Q. You said this was a costly picture. How much was [332] the picture to cost?

A. I said a costume picture, a period picture.

Q. A costume picture. I didn't understand. What was the budget on this picture, do you recall, approximately?

A. I think it was somewhere close to one million two.

The Court: Meaning \$1,200,000?

The Witness: Yes, sir.

Q. (By Mr. Knupp): Was that at that period a costly picture and generally considered a costly picture in the motion picture industry?

A. Yes, that represented quite an expensive picture.

(Testimony of Robert Sparks.)

Q. Did you have any further discussion at the time Mr. Tone's name was mentioned with Miss Sheridan, again, about Ryan or Ferrer?

A. Well, I think I told Ann at one period in these discussions that we had—I don't know, there were five or six of them—over a period exceeding a month, that I felt she could make this very easy on herself if she accepted either Ryan or Ferrer, and I strongly advised her that of the two I liked Ryan better for the part. But she had practically no interest or no feeling about Ryan, although the part that she saw him in in "Bed of Roses" he was a romantic type, a leading man. He is considered a very virile actor.

Q. Who did he play with in that? Did you say Joan Fontaine? [333] A. Yes.

Q. Who I understand is one of the best known leading women in the motion picture business?

A. As a matter of fact, when Miss Fontaine came on the lot to make "Bed of Roses" she requested Ryan.

Q. Do you recall at the meeting where Mr. Tone's name came up and you had this discussion about whether Miss Sheridan wouldn't further consider Ferrer or Ryan, you had some discussion or Mr. Hickox made some statement about the question of what would happen if the picture didn't get started?

A. Well, I think under the terms of Miss Sheridan's contract she had 15 weeks——

Mr. Gang: Just a moment. I hesitate to inter-

(Testimony of Robert Sparks.)

rupt the narrative, but I do think Mr. Knupp shouldn't lead this particular witness, who is his own witness. I might suggest if he would get the conversation chronologically, persons present, we might get the story in a less objectionable form. I don't object; I just make the suggestion.

The Court: The answer will be sticken, anyhow, since the witness started to tell us what was in the contract. The contract is in evidence.

Mr. Knupp: I can state to the witness that the contract does require that unless Miss Sheridan's services are completed within 15 weeks from the starting date she is entitled [334] to receive additional compensation of \$10,000 a week.

There is no objection to my making that statement to the witness, if the court please.

The Court: What is your question to the witness now?

Mr. Knupp: I am asking now for the conversation that ensued at this meeting in his office with Miss Sheridan and Mr. Hickox with respect to what would be the result if the picture wasn't finished in 15 weeks?

The Witness: I think Mr. Hickox made some remark about the \$10,000 a week, and that Howard Hughes had plenty of money. Some such remark.

Q. (By Mr. Knupp): Do you recall having further conversations after this time with respect to the possibility of filling this part, Mr. Sparks, I mean with Miss Sheridan and Mr. Hickox?

A. I may have, Mr. Knupp, but around this

(Testimony of Robert Sparks.)

period I think that Mr. Rogell took over the attempt to try to get this matter solved, and I was on the fringe of some of those conversations and meetings, but I think that——

Q. Did you have any discussions with Miss Sheridan or Mr. Hickox with respect to Basehart, Richard Basehart?

A. No, I did not.

Q. Do you recall now about the date on which you had your last discussion with Miss Sheridan with respect to this matter? The contract was terminated on August 17th; does [335] that refresh your recollection as to how long before that you may have discussed the matter finally with Miss Sheridan?

A. I think it must have been around the early part of August.

Q. Do you recall what Miss Sheridan told you in her last conversation with respect to the matter?

A. She told me that the actor she wanted for this part was Franchot Tone, and that all other names that had been submitted were completely unacceptable to her.

Q. Did she say what she expected or intended to do in that connection?

A. No.

Q. Mr. Sparks, this picture was finally produced at the studio?

A. It was.

Q. And in the production Miss Ava Gardner appeared in the role of Barbara, the leading lady?

A. She did.

Q. And Robert Mitchum as Mark Lucas?

A. He did.

(Testimony of Robert Sparks.)

Q. Do you know whether or not at the time that you had these discussions with Miss Sheridan, Mitchum was available for a part in the picture "Carriage Entrance"?

A. No, Mitchum was in a picture called "Holiday Affair."

Q. Do you know whether he had subsequent commitments [336] at the studio after he finished "Holiday Affair"?

A. The position of Mitchum was—Mr. David Selznick had half of Mr. Mitchum's contract.

Q. When you say he had half of his contract, what do you mean?

A. I mean that he held half interest in Mr. Mitchum as an actor.

Q. Was he entitled to half his time?

A. He was entitled to half his picture time. And Mr. Hughes was at that time talking about putting him in "Jet Pilot," and Mr. Selznick was talking about selling him to Warner Brothers, and in fact—that is all for that period.

Q. Do you know when it was finally determined to put Mr. Mitchum in "Carriage Entrance"?

A. Well, Mr. Mitchum reported to me somewhere around the 26th of September.

Q. When did the production actually start?

A. The principal photography started on the 3rd of October.

Q. Do you know when Miss Gardner was assigned to play the leading female role in the picture?

(Testimony of Robert Sparks.)

A. I believe this was somewhere around the middle of September, Mr. Knupp. I am not exactly sure.

Q. After Miss Sheridan's contract was terminated was [337] anything done with respect to the script?

A. The only thing that was done, I had some discussions with Mr. Rogell about it and told him that Parsonnet—

Q. Just omit your discussions with Mr. Rogell.

The Court: Did you revise the script?

The Witness: Yes, we did.

Q. (By Mr. Knupp): Was there any revision of the script after Miss Sheridan's contract was terminated? A. Yes.

Q. Do you know whether or not prior to the termination of her contract that costumes for Miss Sheridan had been finished?

A. They had been completed.

Q. And what happened to those after her contract was terminated? Were they used by the subsequent actress who took her place?

A. I believe that two of them were suitable.

Q. What happened with respect to the production staff after Miss Sheridan's contract was terminated? Was the staff continued?

A. I don't believe so, Mr. Knupp. I wouldn't know. The production department would know that.

Mr. Knupp: I think that is all.

The Court: We will take a short recess at this time.

(Testimony of Robert Sparks.)

Court will remain in session until the jury [338] retires.

Remember the admonition of the court not to discuss this case among yourselves or with anyone else, or to form or express any opinion of the case until it is finally submitted for your verdict. The jury may retire.

Court will stand adjourned.

(A recess was taken.)

The Court: The record will show that the jury are present and in their proper places.

Mr. Gang: So stipulated.

The Court: Proceed.

Mr. Gang: If the court please, may I hand to Mr. Sparks the original of his deposition taken by me on December 12, 1948, before Harold M. Liebovitz, Notary Public, so in case any questions arise it will be available to him?

The Court: You may.

Cross-Examination

By Mr. Gang:

Q. Mr. Sparks, the responsibility of a producer is a serious one, is it not? A. It is, yes.

Q. In other words, you have somewhat direct charge of the actual operations leading up to the making of the picture and until it is completed?

A. Normally, yes. In this case this was governed a great deal by Mr. Banks' relation to the picture. [339]

(Testimony of Robert Sparks.)

Q. In other words, your situation here was not a normal one? A. Abnormal, certainly.

Q. And that distinguishes it from the ordinary run-of-the-mill picture in which you acted as producer? A. Yes, sir.

Q. Is it fair to state that you were sort of a watchman for the studio on this operation?

A. That, and a messenger boy.

Q. In other words, a watchman and messenger boy, liaison is a five dollar word for that?

A. That's right, sir.

Q. You also said that this package was taken over by the studio, is that correct?

A. That was my understanding, yes.

Q. And at the time you were informed of your function for the studio you understood that the picture was ready to be made, you said?

A. That's it, yes.

Q. That meant that Miss Sheridan was to play the leading female role? A. Yes.

Q. Mr. Robert Young was to play the leading male role? A. That's right.

Q. The director had been approved? [340]

A. Yes.

Q. And the screen play or story to be made had been approved? A. Yes.

Q. Did you state in your direct testimony from whom you got this information at the studio?

A. Mr. Rogell.

Q. Did you understand at that time that this project was taken over as part of the settlement of

(Testimony of Robert Sparks.)

a lawsuit? A. I didn't know that, no, sir.

Q. Did you subsequently learn that?

A. I learned that, yes, sir.

Q. In that connection you testified on direct examination that Mr. Depinet, who was in charge of sales, I believe, said that this was not a salable film anyway. Do you remember saying that?

A. No, I didn't say "salable." I said it was not a desirable film from the standpoint of sales, because as distinguished between a modern picture, a costume picture is supposed to be, according to the precedents of this business, less appealing at the box office than the modern picture.

Q. I made a note at the time you said it, Mr. Sparks. If there is any question in your mind about the language, I will be glad to have the reporter find it. My notes say [341] that it is not a salable picture anyway. Is it possible you said that?

A. I didn't mean that. I meant as salable.

Q. You meant it is not as salable as some other film? A. As a modern film.

Q. And is that because it was a costume picture?

A. Yes. That is an old witches' tale in motion picture business, Mr. Gang. I don't know whether this is true or not, but that has been always said, that a costume picture is not as desirable from the box office point of view as a modern picture.

Q. In other words, the people who had to sell the picture for RKO were not favorably impressed with the story material, is that right?

A. Well, I don't know that they knew much

(Testimony of Robert Sparks.)

about the story material. I think they were more concerned about what the adjuncts would be from the standpoint of cast, marquee value, that is called.

Q. In your statement, whichever way you phrased it, that it was not as salable as other film, was that because of the fact that it was a costume story, a story that required that it be made as a period picture?

A. That is one of the factors, yes.

Q. It wasn't the type of story that RKO would have voluntarily undertaken to make, itself, is that right? [342]

A. That may be true.

Q. And this attitude of the sales department was communicated to you by Mr. Rogell, is that right?

A. At the point where Mr. Tone's name was submitted to Mr. Depinet.

Q. On direct examination you said that you didn't in July know what time would be required to shoot the picture?

A. That's true.

Q. Do you remember the occasion on the taking of your deposition on December 12, 1949?

A. I do.

Q. At RKO? A. I do.

Q. And you were sworn at that time and examined by me in the presence of Mr. Knupp?

A. I do.

Q. Would you look at page 41, lines 17 to 21? If you will read the questions and the answers. I ask you to read them now for the purpose of refreshing your recollection only.

Mr. Knupp: At what line?

(Testimony of Robert Sparks.)

Mr. Gang: Lines 17 to 21, Mr. Knupp.

The Witness: I have read it.

Q. (By Mr. Gang): Can you now testify from your [343] refreshed recollection as of that date, which was about July 9, 1949?

A. Do you mean as to the length of time of the schedules?

Q. Yes.

A. I think I said—your question was: “The substance of this is that assuming a mythical thirty-six-day shooting schedule, you say the maximum date,”——

Q. In other words, around the middle of July you did write Mr. Rogell a memorandum, didn't you?

A. Yes, I did.

Q. At that time you did have a revised script?

A. I did, yes.

Q. And it was after Mr. Young had refused to play the part, is that right?

A. That's right.

Q. You did write Mr. Rogell then giving him your estimate based on that script as to what the latest date was that you could start with Miss Sheridan and still finish by October 10, 1949?

A. That's right. [344]

Q. At that time you did state, did you not, that you could start as late as August 29, 1949?

A. That was based on a mythical 36-day schedule.

Q. You were in court when Mr. Schuessler testified that they had a 30-day shooting schedule?

A. Mr. Gang, at our studio, which I presume is

(Testimony of Robert Sparks.)

the same as any studio, the moment that a picture is assigned to a producer it goes to the production department and the production department almost invariably will lay this picture out in 28 days or 30 days, regardless of the fact that it may subsequently have the same picture schedule for as high as 40 or more days. This is purely for purposes of rough budget.

Q. You were still functioning when the picture was actually made, were you not?

A. Yes, I was.

Q. How many days did the shooting actually require? A. It required——

Q. From October 3rd to November 16th, the stipulation is.

A. There were around 40 days of shooting.

Q. Including retakes and added scenes?

A. Including three days, I think, of added scenes and six days of rehearsal.

Q. In other words, the actual shooting was somewhere [345] around 30, 31 days?

A. The actual shooting was 39 days.
scenes and six days of rehearsal.

A. No; actual shooting days.

Q. You had about a week's rehearsal before the shooting commenced? A. That's right.

Q. One of your functions was, you said, casting, is that right, as a producer?

A. As a producer, yes.

Q. In this particular case who did the casting of the principal roles, if you know?

A. Well, there was only one principal role to be

(Testimony of Robert Sparks.)

cast and that was the leading man. To my knowledge that was not cast until the 26th of September.

Q. To your knowledge. You had nothing to do with that, however?

A. I had nothing to do with that.

Q. Were you informed?

A. I was informed that Mitchum was assigned.

Q. Do you remember reading any items in the newspapers early in September about Mitchum and Gardner playing the role?

A. Yes, it was somewhere around the middle of September that I read in one of the trade papers one morning that Mitchum [346] had been assigned to "Carriage Entrance." I came to the studio and asked Mr. Rogell about it, and Mr. Rogell said, "Don't be too certain, I don't know how that got in the paper, because there is some litigation and argument going on between Mr. Hughes and Mr. Selznick. There is a question as to whether John Wayne will be available in 'Jet Pilot.' If Wayne is available for 'Jet Pilot,' and some arrangement can be arrived at between Mr. Hughes and Mr. Selznick, then you may get Mitchum for the picture."

Q. Before Miss Sheridan's contract was terminated, did you discuss with Mr. Rogell the possibility of getting Mitchum for the picture?

A. No. I knew the Mitchum situation. He was presently——

Q. Please, Mr. Sparks. I think we will save time if you answer my question. Did you discuss

(Testimony of Robert Sparks.)

the possibility of getting Mr. Mitchum for the part with Miss Sheridan?

A. No. I told Miss Sheridan that he was not available.

Q. Did you discuss with Miss Sheridan the getting of Mr. Mitchum for that part? A. No.

Q. Did she ask you if Mitchum could be obtained? A. She did, yes.

Q. She said she would like to have him for the part? A. She said that she would, yes. [347]

Q. What did you say when she said that?

A. I said that he was not available.

Q. Did you say that without talking to Mr. Rogell? A. I knew the situation——

Q. Answer my question. Did you say that to her without consulting Mr. Rogell? A. Yes.

Q. Had you talked to Mr. Rogell prior to that about the possibility of getting Mr. Mitchum?

A. We had gone over the entire contract with respect to players.

Q. Who is “we”?

A. Mr. Rogell and myself.

Q. When did you do that?

A. Right around the time that Mr. Young turned down the role.

Q. Was Mr. Mitchum’s name on the list——

Mr. Knupp: Just a minute, Mr. Gang. You ask the witness a question and then start another one when he gets to the middle of the answer.

The Court: He could have answered it yes or no, and then made an explanation. I was still waiting

(Testimony of Robert Sparks.)

for the answer. Go ahead and finish the answer.

Q. (By Mr. Gang): Go ahead and finish.

A. I have lost the thread of this now, Mr. Gang. [348]

Q. So have I.

The Court: Read the question and read the answer.

(The record was read by the reporter.)

The Court: I think Mr. Gang's interrogation was proper. I was trying to follow it myself. In view of the type of answer the witness made I think Mr. Gang was right in pulling him back to the question whether Mr. Mitchum's name was on that list.

Answer this immediate question and try to get back on to the other one.

The Witness: The immediate question being——

Q. (By Mr. Gang): Was Mr. Mitchum's name on the list of actors that you discussed with Mr. Rogell?

A. When I spoke of "list" may I, Mr. Gang—and I am sorry, I apologize—when I spoke of "list" I was speaking of our contract list of players. I was not referring to a list with respect to the cast of the picture. I referred to such persons as Mitchum, Ferrer, Ryan, and such other players as we have under contract.

Q. Then your answer is that Mitchum's name was on the list——

A. On the contract list.

Q. And you did discuss him with Mr. Rogell?

A. I did, yes.

Q. Was this before or after Miss Sheridan had

(Testimony of Robert Sparks.)

asked for [349] him? A. Before.

Q. You think at that time that Mr. Mitchum would have been good casting for the role?

A. I thought he would have been fine. I think Mr. Mitchum is fine in anything.

Q. You stated that you tried to reach Mr. Young after you were informed that he refused to play the part, is that right? A. I did.

Q. Can you cast your mind back to the meeting with Mr. Banks and Miss Sheridan, at which Hickox was also present, when you first discussed the situation which now existed by reason of Mr. Young's refusal to portray the role? I want you to try to fix the first meeting. Can you remember any discussion at that time about why, the possible reasons why Mr. Young turned it down?

A. Admittedly from his agent he had turned it down because the part no longer suited him.

Q. That was one of the subjects of the discussion, was it not? A. That was, yes.

Q. You then knew and discussed the reason for the turn-down, which was that in his opinion, or in the opinion of his agent, the part as rewritten was no longer big enough [350] or important enough to appeal to him, is that right?

A. No. I said appealing enough, Mr. Gang.

Q. Did they say in what respect, Mr. Sparks? I wasn't there. I will have to ask you.

A. I don't know. I think that was a matter we discussed, because we were trying to determine why

(Testimony of Robert Sparks.)

Mr. Young, if he accepted the script in the first instance, turned it down in the second.

Q. In that conversation was anything said about the reasons for that? In other words, let me put it to you this way: Didn't somebody say that in the revision the part had been written down so that it wasn't any longer important enough for a man of his stature?

A. I don't recall that, Mr. Gang, no.

Q. Perhaps this will help you recall it. You said in your direct testimony that you called Mr. Goldstone on the phone to see if you could not get an opportunity to fix the script?

A. I called him to see what he wanted done with it so we might fix it in case he didn't like it, but I don't as I sit here now know the specific reason why Mr. Young turned down this part, because I never have talked with Mr. Young about it, either at that time or since.

Q. I suggest to you that Miss Sheridan on that occasion told you that she was not surprised he turned it down [351] because the revision had minimized his part. Does that refresh your recollection? A. She may have said that.

Q. Did Mr. Banks say anything about that?

A. He may have. I don't know.

Q. So when you called Mr. Goldstone, Mr. Young's agent, to seek an opportunity to fix it you had in mind fixing it to make it more important again, isn't that so?

A. Well, the question of importance, I called to

(Testimony of Robert Sparks.)

find out exactly and specifically what Mr. Young objected to when I spoke of fixing it, and I don't know what that was, Mr. Gang.

Q. You don't at this time remember?

A. No.

The Court: As I understand it, this part of Quentin was first, on one of the rewrites of the script, written down to make it a weaker part, and then was later on written up to make it a more impressive part?

The Witness: No. I think, your Honor, the "down," at least in anything that I may have said about it, when I said "down" to bring it from what we will call a higher educational level to a lower educational level. In other words, a man—this is a rather strong man, rather than a man just engrossed in books.

The Court: You mean written down in that sense? [352]

The Witness: In that sense, yes.

The Court: Go ahead.

Q. (By Mr. Gang): May I refer you, Mr. Sparks, to page 55 of your deposition, line 9?

"Q. Then you started looking for a leading man. With whom did you start looking?

"A. Well, we had lost two possibilities that we had for leading men, because in the meantime Mr. Bob Ryan and Mr. Mel Ferrer had become, due to not being used elsewhere, had become available to the Skirball unit, and we then started to go over the possibilities of a leading man. This was a leading difficulty, be-

(Testimony of Robert Sparks.)

cause we had a role that was—I presume some source of information that furnishes the agents the problems of the studios—I think everyone was acquainted with the fact that this is what they referred to as a weak sister of a leading man role, and it was a leading difficulty to try to find someone who could satisfy the box office requirements of the picture, because this was an expensive picture, and who could play the part.”

Do you remember so testifying?

A. I do, yes.

Q. Does that refresh your recollection now as to the [353] problem you had with the part after the revision?

A. I stated, Mr. Gang, that this was a woman's picture, this essentially was a story about a woman, there were three leading men, there was no single leading man, and the part of the professor was one of the three persons, and it is always a problem when you have a strong leading feminine role to find a strong leading man to go with her, especially when she outshines him, because there is a certain professional standing that is something that actors understand that I won't attempt to discuss that would make them feel that they might be playing a subordinate role, and the part of the leading woman in "Carriage Entrance" was always the star role. She has at least 75 per cent of the story. It is something about her and not about anybody else.

Q. It is a fact, isn't it, that up until the time

(Testimony of Robert Sparks.)

Mitchum was assigned to the role the problem of the Dr. Quentin part was always a serious one?

A. Very serious.

Q. And it is a fact, is it not, that the story and the scripts, even your revised one, were in such shape that the part played by Melvyn Douglas was a much more colorful one from an actor's point of view?

A. That has been true from the very beginning, Mr. Gang.

Q. You had a story problem in that respect from the very [354] beginning, did you not?

A. True.

Q. And in the revisions from the story in the form in which it was when Mr. Young had approved it, until he disapproved it, something happened to weaken the role even more than it originally was, isn't that so?

A. I would say perhaps shorten it, Mr. Gang, yes.

Q. And it was your opinion at that time, and I am talking about July of 1949, that the professor, who was the Dr. Quentin part, was something of a jerk and not a strong character at all?

A. It was in that script, yes, sir.

Q. And those are your words, are they not, Mr. Sparks?

A. That's true.

Q. And he remained a weak character up until the time Mr. Mitchum was assigned to the role, did he not?

A. We were strengthening the part as best we

(Testimony of Robert Sparks.)

could all along throughout our various writing phases.

Q. It is a fact, the role was rewritten in September in order to have it available for Mr. Mitchum to play it?

A. It was rewritten the latter part of September, yes.

Q. To make it worthwhile for Mr. Mitchum?

A. To make it more desirable, shall we say.

Q. And when you said before you could not understand Mr. Young's reasons for refusing to play the part in the [355] revised script, is your recollection now refreshed, can you tell us whether you then did know what his reasons were?

A. I did not know his reasons, Mr. Gang, from any contact with Mr. Young.

Q. But you did know from the discussion with Miss Sheridan and Mr. Banks?

A. They had made some mention, yes.

Q. What I am trying to fix is that you did know then and reported to Mr. Rogell why in your opinion Mr. Young had turned the part down?

A. I did.

Q. Did you discuss revising the part while you were discussing other possibilities for a leading man?

A. We may have, yes.

Q. And did Mr. Banks and Mr. Parsonnet continue to work on the script?

A. They did, yes.

Q. And to discuss it with you? A. Yes.

Q. I did understand you to say that you would

(Testimony of Robert Sparks.)

have welcomed an opportunity to fix the part up for Mr. Young if he would reconsider his decision, is that right? A. True.

Q. You got no second chance at that?

A. None. No first chance, Mr. Gang. [356]

Q. Well, I mean there was no chance to change his mind? A. True.

Q. May I direct your attention to the meeting at which the name of Mr. Tone first came up. Who was present on that occasion?

A. Mr. Hickox, Miss Sheridan, Mr. Banks, myself, and I don't recall whether Mr. Stevenson was there or not.

Q. And can you remember how long this was after you had had your first meeting at which Mr. Young's refusal had become public knowledge?

A. No, I can't exactly, Mr. Gang.

Q. Would it be sometime between the 10th, 11th or 12th of July and the middle or end of July?

A. It would be, I should say, yes.

Q. And during this period of time this was a matter of some importance to you, was it not, Mr. Sparks? A. Yes.

Q. You knew that you had a time limit within which to use Miss Sheridan's services, is that right?

A. True.

Q. And it was therefore important to get on with the ascertainment of who would be designated as the leading man? A. That's right.

Q. In this meeting, then, that was the primary subject [357] for the conference, was it not?

(Testimony of Robert Sparks.)

A. With Mr. Tone, you mean?

Q. No, with Miss Sheridan? A. Yes.

Q. And can you remember at this time whether the conference was called at your office by you or by Mr. Banks?

A. I think Mr. Banks arranged all the meetings.

Q. And it was after discussion with you, was it not? A. Yes.

Q. And the purpose of that was to discuss with Miss Sheridan possible actors who might be available to play the leading role?

A. Yes, we always met for that purpose.

Q. And Miss Sheridan did come to your office?

A. Yes.

Q. And you did have a meeting?

A. We did.

Q. Do you remember how long this particular one lasted? A. No, I don't recall.

Q. Can you remember taking out the two or three or four-inch volume called the Casting Directory on this occasion?

A. Many times, yes, sir.

Q. I want now to have you direct your attention, if you can, to the occasion on which you say the name of Mr. [358] Tone was first mentioned, that is the meeting I am now inquiring into. Can you remember that on that occasion you did get your copy of the Casting Directory and go through it?

A. I probably did, Mr. Gang.

Q. Your "probably" won't do us much good, because I really want you to testify to your best

(Testimony of Robert Sparks.)

recollection, Mr. Sparks, and if you don't remember it, we are all human here, and I would prefer you to say you don't remember, rather than to have you guess just to make me happy.

A. I don't remember. I would say that I probably did, but I don't remember.

Q. You do remember that the name of Franchot Tone was mentioned? A. I do, yes.

Q. Isn't it a fact that you first mentioned the name at that conference? A. I may have.

Q. And isn't it a fact that you mentioned his name while you were leafing through the Casting Directory?

A. We mentioned many names. I probably did, yes.

Q. That is your best recollection at this time, that you did? A. Yes.

Q. When you mentioned his name did you say "Mr. Tone" [359] or "Franchot Tone" or "Doc Tone"? What did you call him?

A. I never knew him as Doc Tone. That is Miss Sheridan's name. I always knew him as Franchot.

Q. When you mentioned his name you mentioned his name as Franchot Tone? A. Yes.

Q. It was then Miss Sheridan said she hadn't seen Doc Tone in a long time?

A. That's right.

Q. Did you ask her at that time whether she thought he might do for the part of Quentin?

A. I think what was said at that time was, I asked her if she might like to see Franchot, that he

(Testimony of Robert Sparks.)

was around the studio, he was on the lot, if she would like to see him I would get him for her.

Q. What did she say?

A. She said she would like very much to see him.

Q. Did you then have him come to your office?

A. I did, yes.

Q. You were present, as you stated, when they talked?

A. I was.

Q. They talked nothing about the picture at that time, did they?

A. Nothing.

Q. He was there about 10 or 15 minutes? [360]

A. At least that.

Q. Or longer?

A. Yes.

Q. And he left and left you and Miss Sheridan and Mr. Banks and Mr. Hickox in the room?

A. He did.

Q. Did you then pursue the subject of the possibility of Mr. Tone portraying the role of Quentin?

A. Miss Sheridan said—I believe if I remember her correct words, she said, “Doc Tone is my man,” and that ended the meeting. It was near the close. She stood up as she said it.

Q. You took this to mean that Mr. Tone had her hearty approval as the casting for that role?

A. I did.

Q. What did you say?

A. I said that I would take it up with Mr. Rogell and see what his reactions to it were.

(Testimony of Robert Sparks.)

Q. May I ask what you said about your own opinion at that time?

A. I said he is a man that probably could play it. I will take it up——

Q. It was for that reason that you suggested his name in the first place, is that correct?

A. I didn't suggest his name in the sense of casting. [361]

Q. In what sense did you suggest his name?

A. This casting directory, as we went through it, for some particular reason this day I happened to mention Franchot Tone's name, and Miss Sheridan said—she said something like "Old Doc Tone?" and I took from that that she knew him. I asked her if she wanted to see him, and she said yes.

I said, "He is on the lot. We can get him in the office if you would like to have a talk with him." So some 10 or 15 minutes later he came down there.

Q. Your present recollection is that Miss Sheridan used the phrase at that time, "That's my man," or "Doc is my man"?

A. "Doc Tone is my man." Some phrase of that sort.

Q. Will you look at page 87 of your deposition referring to this meeting. I won't read all of it. I will direct your attention to line 24, in which you said, "After he left Ann got up and said, 'Well, that is the leading man, that is the leading man I want. I want him for my leading man.'"

Did you so testify, Mr. Sparks? A. Yes.

Q. This is December of 1949. Was your recol-

(Testimony of Robert Sparks.)

lection then that those were the words she used?

A. It was at that time, yes, I guess. [362]

Q. Has anything occurred since then that brings the phrase "Doc is my man" to your mind?

A. No.

Q. You did not on direct mention these names, or at least not some of them, so I will ask you: Can you remember any discussions in July or early in August with Miss Sheridan and Mr. Banks with reference to Wendell Corey?

A. No, I do not.

Q. Were you not informed by Mr. Banks of his trip to the Paramount lot to look at a picture?

A. I did not hear that until he was on the stand. I did not know that that had happened.

Q. You said that the name of John Lund was mentioned, however?

A. It was, yes.

Q. And Miss Sheridan did, after first being ignorant of his performance in "Foreign Affair," she did subsequently tell you that she would approve him?

A. She would like—she said she would consider him. I don't believe she said "approve."

Q. Did you notify Mr. Schuessler or Mr. Rogell that Mr. Lund's availability should be checked because Miss Sheridan indicated she would approve him?

A. I did.

Q. And do you know that a script was actually sent by [363] RKO to Paramount?

A. I didn't know that a script had been sent.

(Testimony of Robert Sparks.)

I thought Mr. Schuessler was checking whether he was available or not.

Q. Did anybody tell you that he became unavailable because they didn't like the script?

A. Later, yes.

Q. You mentioned the fact that Robert Preston was in a picture called "Blood on the Moon"?

A. I did.

Q. Miss Sheridan saw that? I don't know whether you were present on that occasion or not.

A. I think that was one of the pictures that was to be run for her, yes.

Q. Do you remember that he played a cowboy in that with a four-day growth of beard, in the picture shown to Miss Sheridan?

A. He might have been.

Q. In her discussions with you after that didn't she mention the fact that he wasn't physically the type for the esthetic part of Dr. Quentin?

A. That is true.

Q. Do you remember when you discussed the possibility of Mr. Ryan, that Miss Sheridan said that he was a big man with a physique of a prize-fighter, which he portrayed in the [364] picture, and not physically suited for that part, do you remember such a discussion?

A. I do remember the discussion, but the discussion was based on the earlier conception of the script, not the script that we were in the process of strengthening.

Q. You do remember, however, she did give as

(Testimony of Robert Sparks.)

a reason to you at one time or another during these conferences the fact that her reason for thinking Mr. Ryan was not suited for the part was physical?

A. He didn't look like a professor, some such remark.

Q. She did say something like that to you?

A. Yes.

Q. With reference to Mr. Preston she did say that he wasn't physically suited for the part?

A. She may have.

Q. What did she say to you about Mel Ferrer?

A. She said she didn't like him at all for it.

Q. Did she give you a reason for it?

A. I don't recall that she did. I had some sympathy with Miss Sheridan's point of view about Mel Ferrer. I much preferred Bob Ryan.

Q. Perhaps this will refresh your recollection. Do you remember a discussion with Miss Sheridan in which she said that Mr. Ferrer would be much better for the part that Melvyn Douglas was assigned for? [365]

A. Perhaps yes.

Q. Such a conversation could have taken place?

A. Yes, that could have taken place. It perhaps did.

Q. You at this time don't remember?

A. It may have.

Q. Have you any present recollection as to how many times you went through the Casting Directory with Miss Sheridan looking for possibilities?

A. I would say four or five.

(Testimony of Robert Sparks.)

Q. On any of these occasions was the name of Richard Conte mentioned?

A. I don't recall Conte's name.

Q. Were you present in court when Mr. Schuesler testified? A. Yes, I was.

Q. Do you remember his testimony with reference to a discussion with Twentieth Century-Fox about borrowing Richard Conte?

A. I do, I remember that.

Q. And about their request for a script?

A. I remember his testimony, yes.

Q. Does that refresh your recollection as to Miss Sheridan having told you that she would approve Richard Conte to play this role? [366]

A. I don't recall Conte's name in our conversation, Mr. Gang.

Q. What was the occasion on which Miss Sheridan was introduced to Mr. Berns, the head of your make-up department?

A. I think that was perhaps either her first or second visit at the studio.

Q. Were you informed as to what Miss Sheridan did thereafter with reference to make-up, hairdress, costume?

A. I think she and Mr. Berns either met up in the make-up department or perhaps in wardrobe and they discussed the question of her hairdress and her make-up, and the assignment of the make-up people and hairdressing people to the picture.

Q. From July 6th of '49 on to August 16th,

(Testimony of Robert Sparks.)

1949, Miss Sheridan came to the studio on each occasion when requested by you?

A. Well, I don't know that I made a direct request, but Mr. Banks would call her. If you mean did she refuse, she never refused, to my knowledge, to come to the studio.

Q. That is what I wanted to know. Any request you, as a producer, had to make of her was complied with? A. Yes.

Q. This had to do with meeting the make-up man, the hairdress man, and the costume [367] designer? A. True.

Q. And you had records of the fact, did you not, in your office, and knew that Miss Sheridan checked the sketches with the designer and subsequently spent a day being fitted, is that right?

A. She did, yes.

Q. You did testify that you told Miss Sheridan that she could make it easy on herself by taking either Robert Ryan or Mel Ferrer, do you remember so testifying? A. I did, yes.

Q. On which occasion did you make this statement to Miss Sheridan?

A. I don't recall, Mr. Gang. It was probably the latter part of July. I would say it would be towards the latter end of July.

Q. Can you give us the context in which you made that suggestion?

A. I don't recall it completely now.

Q. May I now direct your attention to the conversation you related briefly about somebody saying

(Testimony of Robert Sparks.)

that Howard Hughes had a lot of money and he could afford \$10,000 a week. Do you remember that testimony? A. Yes.

Mr. Knupp: Are you referring to what he testified in the deposition? [368]

Mr. Gang: No. I am referring to what he said on direct. I just wanted to make such that Mr. Sparks remembered testifying with reference to such a subject this morning.

The Witness: I do.

Q. (By Mr. Gang): You do? A. Yes.

Q. Isn't it a fact that that particular conversation took place not in your office, but walking on the lot?

A. No, that conversation took place as Mr. Hickox left my office, we left it together.

Q. And who else was with you, with you and Mr. Hickox?

A. I don't know. We were filing out of the office. I don't know who was ahead or behind.

Q. And it is a fact, isn't it, Mr. Sparks, that Miss Sheridan was there, too?

A. Could have been.

Q. And walked ahead of you and Mr. Hickox?

A. Yes.

Q. And isn't it a fact that you are the man that said Mr. Hughes has a lot of money, \$10,000 a week wouldn't bother him? A. Absolutely not.

Q. Didn't the subject arise because somebody said, "You had better get on with this picture, time is running"?

(Testimony of Robert Sparks.)

A. I think I made the remark that we had better hurry [369] along with the picture and get it started because time was running out.

Q. And at that date you were aware of the fact that time was running? A. Yes.

The Court: While we are talking about time running, it reminds me it is noontime.

We will take our recess until 2:00 o'clock.

Ladies and gentlemen of the jury, you will remember the admonition of the court not to discuss this case among yourselves or with anyone else, or form or express any opinion on the merits of this case until it is finally submitted to you for your verdict.

The jury may retire. Court will remain in session.

(Whereupon the jury retired from the court room.)

The Court: Anything further? 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p.m. of the same day.) [370]

Thursday, February 1, 1951—2:00 P.M.

The Court: The record will show that the jurors are in their proper places.

Mr. Gang: Agreed.

Mr. Knupp: Yes, so stipulated.

(Testimony of Robert Sparks.)

ROBERT SPARKS

called as a witness by and on behalf of the defendants, having been previously sworn, was examined and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Gang:

Q. When we broke for lunch, Mr. Sparks, you had just stated that in a conversation between you and Mr. Hickox a remark was made about it costing Mr. Hughes \$10,000 a week, and I ask you if you recognize Mr. Hickox in the court room now?

Will you stand up, Mr. Hickox, please?

(A man stood up.)

Q. (By Mr. Gang): Is that the gentleman?

A. Yes.

Q. Will you please repeat that conversation as best you remember it, what you said and what he said?

A. We had finished one of our conferences about the [371] cast, and as I remember it, Miss Sheridan and Mr. Banks, I believe, had gone out ahead of us, and Mr. Hickox and I were going out the door of my office, I think we may have been going up to Mr. Rogell's office, and I made some remark that we were wasting a lot of time, to which Mr. Hickox answered that he didn't mind that because Mr. Hughes didn't mind the \$10,000 a week.

Q. What did you say?

(Testimony of Robert Sparks.)

A. I made no comment at all.

Q. What did Mr. Banks say?

A. I don't think Mr. Banks was in on this conversation.

Q. Or Miss Sheridan? A. I believe not.

Q. That is your present recollection?

A. Recollection, yes.

Q. Did you report that conversation to Mr. Rogell? A. No.

Q. Can you fix the date of that? Was it at or about the time that Mr. Tone's name came into the discussion?

A. I believe it may have been after, I think that is when it was.

Q. I don't wish to confuse you. May I refer you to your deposition, page 88, bottom of page 88, and the top of page 89, which indicates that in December of 1949 when your deposition was taken you placed that conversation as after [372] the meeting at which Mr. Tone's name had been mentioned.

A. Well, it was after, I don't know whether this was immediately after, or whether this was another meeting, I don't recall now.

Q. At the top of page 89 you said, after mentioning Mr. Tone's name, "With that she and Hickox left the office." Does that refresh your recollection that it was on that date that the conversation took place? A. Yes.

Q. May I ask you now to direct your attention to the picture "Bed of Roses." Did you see the

(Testimony of Robert Sparks.)

entire picture with Miss Sheridan? A. No.

Q. Just excerpts?

A. We saw one day's dailies, and I believe at another time when I was not present she was shown some other parts of it.

Q. Can you remember at this time what type of character Mr. Ryan portrayed in "Bed of Roses"?

A. Well, Mr. Ryan, in "Bed of Roses" was a writer.

Q. What did he look like physically? Like Ernest Hemingway?

A. No; he looked like a very normal writer as we know writers.

Q. Wasn't he a rough, tough-looking [373] writer? A. No.

Q. Mild, meek?

A. No, I wouldn't say that. I would say he was quite normal.

Q. Will you describe his physical appearance in the picture?

A. Well, it was Robert Ryan, there was no attempt whatever to make him appear otherwise.

Q. He is a big man, isn't he, physically?

A. He is a man, I should say, six feet or better tall.

Q. And he has rather rough-hewn features, hasn't he?

A. Perhaps they might be considered so.

Q. And the part he played was of a writer in the realistic style, may I say? A. A writer?

Q. Like Hemingway, would you say?

(Testimony of Robert Sparks.)

A. He played a writer. I don't know Mr. Hemingway.

Q. You have seen pictures of him and remember his writings?

A. I have read his writings.

Q. In your opinion he wouldn't be a rough, tough writer in that picture?

A. No, I don't think so.

Q. One last subject, Mr. Sparks, which is this: Do you have any recollection of discussing with Miss Sheridan [374] her desire to talk to Mr. Hughes?

A. Well, I think she expressed such a desire, and I think at the time it was discussed I suggested that she go to Mr. Rogell and have Mr. Rogell set up an appointment, which I believe was subsequently done.

Q. In that talk with you did she tell you that the reason was that she wanted to get a leading man appointed so the picture could go on?

A. I think she wanted to make a personal appeal to Mr. Hughes to accept Mr. Tone, I believe.

Q. Did she say that?

A. I think that was the point.

Q. Was it restricted to that alone, is that your best recollection?

A. I believe so.

Q. She didn't say anything about any other leading man?

A. I don't recall that any other leading man was discussed.

(Testimony of Robert Sparks.)

Q. Could she have mentioned Mr. Mitchum, too?

A. I don't believe so, no. I would say no.

Q. You are not certain about it?

A. I am not certain about it.

Q. You are sure, however, that it was Miss Sheridan's desire to talk to Mr. Hughes? [375]

A. I am that, yes.

Q. And you agreed that she should talk to Mr. Hughes? A. Definitely.

Q. You also wanted somebody in the part, did you not? A. I did, yes, sir.

Q. Did you subsequently talk to Miss Sheridan after she met with Mr. Hughes?

A. I don't believe that I had any discussions with Miss Sheridan regarding her meeting with Mr. Hughes. I think that was at the point where Mr. Rogell and Miss Sheridan and Mr. Hickox were engaged in trying to finalize this decision.

Q. Is it fair to say that the last time that you talked to Miss Sheridan that you now remember was a time at which she wanted to see Mr. Hughes about getting a leading man for the part?

A. I believe that was the last time.

Q. And the next thing you remember was reading in the paper that Miss Sheridan had been fired?

A. That's it.

Mr. Gang: Thank you.

(Testimony of Robert Sparks.)

Redirect Examination

By Mr. Knupp:

Q. Mr. Sparks, I think you once made some mention of a list of contract writers at the studio. Will you tell me [376] exactly what you meant by contract writers?

The Court: I think you are talking about contract actors, aren't you?

Mr. Knupp: Actors, I mean. I beg your pardon.

The Witness: Well, contract actors are actors that are under contract to the studio for purposes of utility and build-up in the pictures of that studio.

Q. (By Mr. Knupp): And is it to the advantage of the studio to use the contract actors when possible? A. It is.

Q. For what reason?

A. Well, because these become part of the assets of the studio, a name value that can draw at the box office is always certainly an asset to a studio, and it is the policy, I believe, of all studios in town to have such actors and actresses under contract.

Q. You said that this picture came to the studio as a package deal and you explained what you meant by a package deal. Was it also advantageous to the studio that the package should have been arranged before it came to the studio?

A. That is normally my interpretation of a package. I would assume so, Mr. Knupp.

Q. So when it came to the studio it was prac-

(Testimony of Robert Sparks.)

tically ready to produce? A. Yes. [377]

Q. With respect to the revisions of this script prior to the time that it was submitted to Robert Young, what was the situation so far as the role of the leading man was concerned with respect to whether or not that role was weaker or stronger than after it was submitted to Mr. Young?

A. Well, the script and the story was always a woman's story.

Q. By that you mean——

A. I mean that the male lead, so-called, was always secondary to the feminine role, and I think that it had been condensed and strengthened in desirability from an actor's point of view in the revisions which we had made of it.

Q. Prior to the time that it was submitted to Mr. Young? A. Yes.

Q. And then after Mr. Young refused the role I think you said there was some additional writing before Mr. Mitchum was assigned, is that true?

A. Yes, sir, there were two additional scenes put in the picture, two additional short scenes.

Q. But did that change the over-all effect, so far as the picture being a woman's picture?

A. No, it did not.

Q. In what respect did it improve the character of Mark Lucas, if at all? [378]

A. Well, I imagine in substance it only improved the length of time that he was in the picture.

Q. You said something about Miss Sheridan having had certain wardrobe fittings and having looked

(Testimony of Robert Sparks.)

at certain sketches at the studio. Do you know just what Miss Sheridan did with respect to her wardrobe or any other matters relating to wardrobe or make-up?

A. Well, actually, Mr. Knupp, those were matters that were handled by the heads of the respective departments. I know that we had a costume designer, Mr. Travilla, there, and I know Miss Sheridan made herself available to Mr. Travilla for such discussion of wardrobe; I know, also, she did the same with respect to Mr. Berns who is the head of make-up. Just specifically and comprehensively what that was I couldn't answer that.

Q. Do you know whether or not the wardrobe for Miss Sheridan had been completed prior to the termination of her contract? A. It had been.

Q. Do you know how late that was in August, if it was in the month of August?

A. I cannot recall the exact date.

Mr. Knupp: I think that is all.

Mr. Gang: One question. [379]

Recross-Examination

By Mr. Gang:

Q. Robert Mitchum was a contract actor, was he not? A. He was, yes.

The Court: You may step down, Mr. Sparks.

(Testimony of Robert Stevenson.)

ROBERT STEVENSON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Knupp:

Q. What is your name, Mr. Stevenson?

A. Robert Stevenson.

Q. Where do you live?

A. In Los Angeles.

Q. What is your business or occupation?

A. Film director.

Q. How long have you been so engaged?

A. As a film director since 1932.

Q. And prior to that time did you have any experience in the motion picture business?

A. I was working pictures since 1928, except during the war when I was in the Army.

Q. In what capacity were you employed? [380]

A. Originally as a reader, then as a writer, then as a producer, then I became a director.

Q. For what companies have you been employed in making pictures?

A. For the first 10 years for Gaumont-British and associated companies in England; for the next 11 years for David O. Selznick; and for the last two years for RKO.

Q. And during the time that you worked for

(Testimony of Robert Stevenson.)

Mr. Selznick or for RKO you had been engaged in the business as a director?

A. As a director, sir.

Q. What are the functions of a director in the motion picture business, Mr. Stevenson?

A. Before the picture goes to the stages to be shot, the director works with and under the producer in the preparation of the picture, but not on the business side, only on the so-called artistic side. When the picture goes to the stages, the director is supposed to guide and control the work of the actors and the technicians who are making the picture.

Q. And direct the action of the actors on the stage?

A. And direct the action of the actors.

Q. When were you assigned to the picture "Carriage Entrance"?

A. I don't remember the date, sir. [381]

Q. Do you remember whether it was before or after Robert Young refused the role?

A. My impression was that it was two or three days before.

Q. Were you at that time familiar with the basic story or the script for the picture?

A. I read the script and the book as soon as I was allotted to the picture.

Q. Did you do any work in connection with the revision of the script?

A. In conference with Mr. Parsonnet and Mr.

(Testimony of Robert Stevenson.)

Sparks, I think I was present at all the script conferences from that period on.

Q. Was Mr. Banks at those conferences?

A. He was at some of the conferences, but not all.

Q. You were familiar with the script, then, in its original form when you first saw it, I mean that was before there was any rewriting that had been done?

A. Yes, I read one script; I understand there were two, I only read one script, the so-called actor's script.

Q. Was the script that was first shown to you a completed script, or was part of it in synopsis form? A. I don't remember.

Q. After the script was rewritten what in your opinion was the effect so far as the character of Mark Lucas was [382] concerned as to whether or not it was a better or worse part?

A. In the original rewriting or the final result?

Q. In the original rewriting.

A. In the original rewriting the part of Lucas was shortened, but it was considerably improved from an actor's point of view, because the part as written by Atlas was the part of a weakening.

Q. How was it changed in the rewriting?

A. The character was given a more positive and dynamic quality.

Q. Was that the script that was submitted to Young and refused by him?

A. That I don't know, sir.

(Testimony of Robert Stevenson.)

Q. Then when the script was rewritten further before Mr. Mitchum was assigned to the role, what changes were made?

A. The character was further developed in the same direction we were going in the transference from the Atlas script. In fact, each version of the script made the character more positive and more dynamic, less of a weakling and esthete. My memory is that two extra scenes were added after Mr. Mitchum was assigned to the picture.

The Court: Do I understand you that the original script when you first saw it had the character of Mark Lucas as sort of a weakling? [383]

The Witness: Yes, sir.

The Court: Had weakness in his character?

The Witness: Yes, your Honor.

Q. (By Mr. Knupp): Did you have any part in any of these conferences with Miss Sheridan about a possible replacement for Robert Young?

A. I was present at one.

Q. Do you recall what occurred at that conference?

A. The only thing I remember was I suggested——

Mr. Gang: May we have the time and place?

Q. (By Mr. Knupp): Just a minute. Mr. Gang suggests the time and place. Do you recall when you had that conference?

A. No, sir. I can recall the place. It was in Mr. Sparks' office.

(Testimony of Robert Stevenson.)

Q. Do you remember about the day?

A. No, sir.

Q. Who was present?

A. I remember that Miss Sheridan was present and Mr. Sparks was present, Mr. Banks was present; I don't remember if anyone else was present.

Q. Do you remember what occurred at that conference?

A. My own memory was that I advocated Bob Ryan for the picture.

Q. You say you advocated. To whom did you advocate? [384] When you say advocated, Mr. Stevenson, we don't understand exactly what you did. Will you tell us what you said or did in that respect?

A. I can't remember exactly what I said, but what I do remember is at every opportunity I brought forth the name of Bob Ryan because I thought he was the ideal man for the part.

Q. Were you familiar with the work of Robert Ryan in pictures, Mr. Stevenson?

A. Yes. I had made a picture with him about six months earlier.

Q. What picture was that?

A. "I Married a Communist."

Q. Had you seen his work in other pictures?

A. Yes, sir.

Q. What other pictures that you can recall?

A. The name escapes me. That boxing picture that has been referred to, in which he played the part of a prize fighter.

(Testimony of Robert Stevenson.)

Q. Is that the "Set-Up"?

A. "Set-Up." I have seen not all but most of the footage of "Bed of Roses."

Q. In which he appeared with Joan Fontaine?

A. Yes, sir.

Q. And in which, also, one of the other actors who has [385] been mentioned here appeared?

A. Yes, sir.

Q. Who was that other actor?

A. Mel Ferrer.

Q. You say you thought that Mr. Ryan was the ideal man for this part in this picture?

A. Yes, sir.

Q. Why do you say that, Mr. Stevenson?

A. Principally because I had worked with him, and if a director has worked with an actor he is in a much better position to judge what he can do than if he had just seen him on the screen, and I had worked with Ryan, and I knew exactly what he could do and what he couldn't do, and in my opinion he seemed right for the picture.

Q. You have heard these other people mention Mel Ferrer?

A. Yes, sir.

Q. What was your opinion with respect to the question of whether Mel Ferrer might have been proper casting in this part?

A. My opinion of Mel Ferrer was he was a very fine actor, I felt he could have been satisfactory in the part, but it would have been necessary to re-write certain scenes to fit his particular type of personality.

(Testimony of Robert Stevenson.)

Q. You were familiar with the work of Robert Preson? [386]

A. Yes, sir.

Q. Did you have an opinion as to whether or not he might have been proper casting in this part?

A. My opinion was that he would have been unsuitable.

Q. What about Richard Basehart?

A. I don't remember Basehart's name being brought up at the conference that I was present at.

Q. You hadn't considered his name? At any time that you were present there was no consideration of Basehart's name?

A. I don't remember.

Q. When you say that you considered that Robert Ryan would have been the ideal casting for this part, you took into consideration the script as it was when Young turned down the role and Robert Ryan was being discussed?

A. In terms of the Parsonnet script, I don't know exactly which one Mr. Young turned down. If I may qualify my answer. The best actor available. Obviously other actors at other studios who were unobtainable would have been better.

The Court: You are qualifying your answer as to who—Ryan?

The Witness: Yes, sir.

Q. (By Mr. Knupp): You mean that you think that he was only the best of the actors who were available, but do you mean [387] to say that you have any question in your mind as to whether he would have been proper casting for the part?

(Testimony of Robert Stevenson.)

A. No, I have no question in my mind.

Mr. Knupp: I think that is all.

Mr. Gang: May I have the exhibits, Mr. Clerk?

Cross-Examination

By Mr. Gang:

Q. I will show you, Mr. Stevenson, Plaintiff's Exhibit 19, dated August 4, 1949, being an excerpt from a memorandum from Mr. Schuessler to Mr. Hughes, and ask you to read it.

You stated that you were present at only one conference with Miss Sheridan?

A. To my memory, yes, sir.

Q. The memorandum which I have shown you, dated August 4, 1949, refreshes your recollection as to a discussion that you had with Mr. Schuessler? I will read it so the jury might hear it, too.

"After a session with Bob Stevenson this morning we learned that the character of 'Quentin,' which everybody has turned down, is being changed into a more intriguing character, and he asked if you would let him have Bob Ryan?"

Now, my question is, Mr. Stevenson, does this memorandum refresh your recollection as to the session that Mr. Schuessler [388] here related?

A. No, sir.

Q. You don't remember that at all?

A. No, sir.

Q. Do you remember asking anybody if you could have Robert Ryan?

(Testimony of Robert Stevenson.)

A. No, sir. I always assumed he could be had if it was agreeable to everybody.

Q. Now, have you any way at the present time of fixing the date on which, in your own words, you were allotted to the picture? Did you mean allotted or did you mean assigned? I wrote it down. I may have misheard you.

A. Either word.

Q. In other words, have you any way of fixing now the time at which you were told that you were to direct the picture "Carriage Entrance"?

A. No, sir.

Q. Did someone give you a written slip telling you that you were assigned?

A. No, sir.

Q. How did you find out? Did somebody tap you on the shoulder or whisper in your ear?

A. I asked Mr. Sparks—if I may explain——

Q. Please do.

A. I was at one time assigned to "Jet Pilot," and I [389] asked to be taken off that because I didn't think that it was a picture that I could handle properly myself. I was then without a picture. Mr. Hickox called me one day, and I believe at my home, and told me that this picture had no director——

Mr. Knupp: When you say "this picture," do you mean "Carriage Entrance"?

The Witness: "Carriage Entrance."

I borrowed a copy of the novel, I liked the novel. I knew that Mr. Sparks was connected with the picture, so I asked him whether it would be possible for me to be assigned to the picture. And

(Testimony of Robert Stevenson.)

if my memory is right, about two days later he told me that I was assigned to the picture.

Q. (By Mr. Gang): In other words, Mr. Sparks told you in so many words that you had been assigned to direct the picture? A. Yes, sir.

Q. Can we take the next step and see if you can fix that time with reference to the 4th of July of 1949? I suppose that holiday doesn't mean as much to you, perhaps, as it does to some of us, but does it register in your mind as a date from which you can take off? A. No, sir.

Q. When you got into the picture on the first conference you are sure that Mr. Young was no longer connected [390] with the project; that is a fact, is it not?

A. No, sir, I stated it was my impression that I came on the picture two or three days before Mr. Young——

Q. Before he had refused the picture?

A. Before he left the picture.

Q. How did you then come to advocate using Robert Ryan if Mr. Young was still in the picture?

A. I didn't advocate using Robert Ryan when I first came on the picture, sir.

Q. I understood you in your direct testimony to say that at this conference, the one conference you attended with Miss Sheridan, you advocated using Robert Ryan. Am I mistaken?

A. No, you are correct.

Q. Was Mr. Young still in the picture?

A. No, sir.

(Testimony of Robert Stevenson.)

Q. Then you are mistaken in saying he had not refused the picture?

Mr. Knupp: The witness didn't say that at all, Mr. Gang.

Mr. Gang: Let me start all over again.

Q. (By Mr. Gang): You had one conference with Miss Sheridan? A. Yes, sir.

Q. On the occasion of that conference had Mr. Young [391] refused to do the picture?

A. Yes, sir.

Q. He had refused to do the picture?

A. Yes.

Q. Therefore, when you came on it was sometime after July 11th or 12th, is that right, if that date is the date on which the studio officially knew that he was not to do the picture?

A. I don't follow you, sir.

Q. I am sorry. I will try to make myself clear. I am trying to fix the date on which this one conference took place. If I state to you that Mr. Young's official refusal reached the studio on July 12, 1949, that fixes that date for that event, is that clear in your mind, sir? A. Yes, sir.

Q. Now, you have said that when you had that conference Mr. Young had refused to do the picture? A. Yes, sir.

Q. And who told you that he had refused to do the picture?

A. I wouldn't remember, it is so long ago.

Q. It was a subject of discussion, however?

A. Well——

(Testimony of Robert Stevenson.)

Q. In other words, the post of leading man was vacant, is that right? [392]

A. At the time of this conference.

Q. Yes, yes. And one of the reasons for the meeting at which you were present was to get the benefit of your advice as to a possible replacement?

A. Yes, sir.

Q. Was any other name mentioned at that one conference besides your advocacy of Mr. Ryan?

A. I don't remember, sir.

Q. You remember only your advocacy of Mr. Ryan? A. Yes.

Q. Now, let me ask you if the name of Charles Boyer was mentioned at that meeting?

A. I don't remember. I think if it had been I would remember.

Q. Was the name of John Lund mentioned at that meeting A. I don't remember, sir.

Q. Was the name of Wendell Corey mentioned?

A. I don't remember, sir.

Q. Was the name of Richard Conte mentioned?

A. I don't remember.

Q. Franchot Tone? A. I don't remember.

Q. You don't remember whether his name was mentioned at all?

A. I don't remember whether it was mentioned at that [393] meeting.

Q. That is what I am talking about, Mr. Stevenson. A. No.

Q. Then in answer to the questions of Mr. Knupp with Mel Ferrer, Robert Preston, and

(Testimony of Robert Stevenson.)

Richard Basehart, you were not talking about that meeting, you were just answering questions generally? A. Yes.

Q. Your answer would be that Mel Ferrer, Robert Preston, and Richard Basehart were not mentioned at this one conference?

A. My answer would be that I do not remember whether they were.

Q. I am only asking you as to your own memory, Mr. Stevenson. You did say that you advocated Ryan as the ideal man for the picture?

A. Yes, sir. The ideal man available.

Q. What do you mean by the word "available" as you use it?

A. In the sense that it is used in film business, meaning an actor who can be obtained to do the part if he is wanted.

Q. You stayed on the picture until it was finished, did you not, Mr. Stevenson?

A. Yes, sir. [394]

Q. Did you complain when Mr. Mitchum was assigned to it in place of Mr. Ryan?

A. No, sir.

Q. Who told you that Mr. Mitchum would play the part? A. I don't remember.

Q. Were you consulted as to whether Mr. Mitchum would be suitable for the part?

A. I don't think so.

Q. And the assignment of Mr. Mitchum, therefore, came as a surprise to you, Mr. Stevenson?

A. I think so.

(Testimony of Sid Rogell.)

Q. A welcome one? A. A welcome one.

Mr. Gang: Thank you, sir.

Mr. Knupp: Mr. Rogell.

The Court: Are you through, Mr. Knupp?

Mr. Knupp: Yes. I have no further questions.

The Court: You may step down, Mr. Stevenson.

Before you leave, I would like to ask you did you direct "Carriage Entrance" when it was made?

The Witness: Yes, your Honor.

Mr. Gang: I asked that.

The Court: If you did, I didn't hear it. [395]

SID ROGELL

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Sid Rogell.

Direct Examination

By Mr. Knupp:

Q. Where do you reside, Mr. Rogell?

A. Los Angeles.

Q. And what is your business?

A. Motion pictures.

Q. How long have you been engaged in the motion picture business? A. About 25 years.

Q. In what different capacities have you worked?

A. Well, started in as production assistant, assistant director, studio manager, producer, executive producer.

(Testimony of Sid Rogell.)

Q. By what studios have you been employed?

A. I have been with RKO for the last 15 years up until May of this year. Previous to that at Columbia for several years. Is that sufficient?

Q. In what capacity did you serve at RKO?

A. I went to RKO in 1936 as studio manager and remained in that position for seven or eight years; subsequently became executive assistant to the late Charles [396] Koerner, who was vice-president in charge of production; I was changed to a capacity known as executive producer by him, and subsequently changed from that capacity by Mr. Hughes to executive producer in charge of the studio directly under Mr. Hughes.

Q. As executive producer in charge of the studio what were your duties and functions, Mr. Rogell?

A. Well, they were certainly varied. I was in charge of getting out the program of pictures, buying stories, hiring writers, producers, casting of the pictures, looking after the cutting, that is, the editing of those pictures, putting the music in them, seeing that they got to New York on time, and the general problems of making a motion picture.

Q. That is, you had the administrative duties, as well as the executive functions of seeing that the pictures were actually produced and ready for distribution?

A. That is correct.

Q. I understand you to say that you are no longer employ by RKO?

A. That is correct.

(Testimony of Sid Rogell.)

Q. And your employment was terminated in May of 1950? A. That is correct.

Q. Were you familiar with the steps that were taken by RKO prior to the time that it entered upon the production [397] of this picture, entered into the contract for its production?

A. In a general way, yes.

Q. What was the situation when RKO first became interested in producing the picture?

A. This picture was first presented to us as a so-called package; an agent, Mr. Goldstone, offered the studio a story and screen play "Carriage Entrance," with a producer Polan Banks, with a star Ann Sheridan, with a leading man Robert Young, represented by that agent, and also under a so-called multiple picture deal with RKO. There were reasons why we considered this favorably.

Q. And what were those reasons, Mr. Rogell?

A. Well, we certainly thought that Miss Sheridan was a very important actress at the time, she had co-starred with Gary Cooper and subsequently with Cary Grant; we thought the story was adequate, although we had some reservations about a costume picture; we liked the idea of using up a commitment with Robert Young.

Q. What was the situation between Young and the studio at the time?

A. Well, he was under contract at the time, I believe, for one picture a year, and those dates come around when you either have to use them or find yourself in default, and this was a convenience to

(Testimony of Sid Rogell.)

use him, he was very satisfactory [398] to us for the part, and had also been approved by Miss Sheridan. We also found at that time, while we were negotiating, that we could use another so-called commitment with a studio contract actor, Melvyn Douglas, an old commitment, and a lot of money involved, in the same picture, in a part for which he was ideally suited. So altogether it looked like a good corporate move to make this picture.

Q. Were you familiar with the script which had been prepared of the screen play at that time?

A. Yes.

Q. Do you recall whether or not now the script had been completed at that time?

A. I believe that a part of it might have been just in outline, but it was acceptable, because we knew we had time to complete it, and it certainly indicated what the balance of the story was going to be.

Q. And Miss Sheridan had approved any one of three men as a director——

A. I believe that's correct.

Q. ——at the same time she entered into the contract?

What was done by you, if you did anything, with respect to assigning somebody as a director to the picture?

A. Well. eventually we both agreed upon Mr. Stevenson.

The Court: "We both agreed"—who do you mean?

(Testimony of Sid Rogell.)

The Witness: I mean both parties; Miss Sheridan and the [399] studio.

Q. (By Mr. Knupp): And did you take any steps in connection with the assigning of somebody to assist as a producer of the picture?

A. Yes, we had some misgivings about Mr. Banks, who has admitted that he had not produced pictures theretofore. He was amenable to having one of our producers, Mr. Sparks, associate himself with the picture. He had agreed that Mr. Sparks might be given credit on the screen as executive producer, and he would still retain his credit as producer. This was satisfactory both to Sparks and to Banks, and we also conferred with Miss Sheridan, who I believe knew Mr. Sparks and thought he would be very satisfactory.

Q. You have mentioned the names of the three principal members of the cast. What if anything was done with respect to securing the minor members of the cast, the remaining members of the cast?

A. There was little or nothing done at the time, because the minor parts seldom furnish a problem. No one would find it difficult to get together on those subordinate parts, I don't believe. It never became an issue, to my knowledge.

Q. In RKO what was the process by which it was determined—I am speaking now of this time in April of 1949—what was the proceeding by which the star parts were [400] cast?

A. The principal casting, I believe, not only at RKO but at any studio, is usually left up to the

(Testimony of Sid Rogell.)

head of the studio. By that I mean Mr. Hughes, even over me. It was up to the casting office, Mr. Banks, director, producer, Sparks, Rogell, to put down their best suggestions and take them up with Mr. Hughes. I think this would be the same in any studio when it comes down to the very top members of the cast.

Q. When did you first ascertain, Mr. Rogell, that Mr. Young would not portray a role in this picture?

A. The date escapes me, but I found out by reason of a phone call when Mr. Nat Goldstone called me and told me.

Q. Was that prior or subsequent to the time that you received a letter from Mr. Goldstone?

A. I believe the phone call preceded the letter.

Q. Do you know whether that phone call came before or after the script had been sent in? I am speaking now of the Parsonnet script.

A. I am not——

Q. Had been sent in to Mr. Goldstone.

A. I presume it was after he received the script, because he commented on the script.

Q. So that if the script went to Goldstone's office on the 7th or 8th of July, and you got this letter of refusal [401] on the 12th, the telephone conversation to which you refer occurred sometime between those two dates?

A. We got the letter on the 12th, did you say?

Q. You got the letter back from Goldstone's office on the 12th, yes.

A. Then I believe the phone call was in between.

(Testimony of Sid Rogell.)

Q. And after you had received this information from Mr. Goldstone's office what steps did you take in an attempt to fill this role?

A. Well, I informed everyone concerned that Mr. Goldstone didn't want to play the part—pardon me, that Mr. Young didn't want to play the part, and that we would have to get busy and look for subsequent or additional names to submit to Miss Sheridan and to Mr. Hughes for this part. That was then the responsibility of the casting office, the director, the two producers, who were immediately concerned with the picture.

Q. Did you have any conversations with Miss Sheridan with respect to the matter?

A. Well, that began a series of conversations which went on from then on.

Q. Do you have any way of fixing the date of the first of these conversations, Mr. Rogell?

A. Well, I would say that shortly after, if that letter—if the telephone conversation was sometime between [402]—what is it, July 8th and 12th, you say?

Q. July 8th and 12th.

A. Along in there, if we found out Robert Young wasn't going to perform, that within a few hours or certainly before the next day we had informed Miss Sheridan of the situation. And, as a matter of fact, if I may say so, we didn't think it was too serious that Mr. Young wouldn't perform. We thought it would be only a routine matter, as those things transpire, and we would be able to settle

(Testimony of Sid Rogell.)

on someone else. But it didn't seem to be a real obstacle at the time.

Q. Can you fix approximately, please, Mr. Rogell, the date on which you had your first conversation with Miss Sheridan with respect to the matter?

A. I would say July 13th or 14th.

Q. Where did the conversation occur?

A. This may have been on the phone. Miss Sheridan, I believe, lives out in San Fernando Valley, and I didn't want to have her come clear to the studio just to say something to her which might have been said on the phone. On the other hand, she was coming in quite regularly at that time.

Q. Did you have any conversations with her at the studio? A. Many of them. [403]

Q. About when do you think you had the first of your conversations at the studio?

A. In regard to this matter?

Q. In regard to this matter, yes.

A. Shortly thereafter, shortly after we learned that Robert Young was not going to perform, and possibly even before the letter was received confirming that.

Q. Where did this conversation take place?

A. Ordinarily in my office.

Q. Was Miss Sheridan alone or was she accompanied by anybody?

A. She was, I believe, always accompanied by Mr. Hickox.

Q. It is your recollection now that every time

(Testimony of Sid Rogell.)

you talked to Miss Sheridan she came to your office in the company of Mr. Hickox?

A. I believe that's the fact.

Q. Can you tell us—and I don't expect you to remember these dates, I don't expect you to remember exactly what was said in any of these conversations that happened two years ago, Mr. Rogell—but can you tell us the substance of your first conversation with Miss Sheridan and Mr. Hickox, and what either or both of them said and what you said with respect to this casting?

A. Well, this precipitated many meetings and conversations [404] by telephone and in my office, or in the studio's commissary or on the lots, wherever we would meet, about this particular problem, and we were constantly suggesting people back and forth. She made suggestions and we made suggestions. I don't remember which day which people were mentioned, but it gets down to all of the names that have been mentioned hereinbefore.

It began—perhaps this is what you are getting at—when Mr. Hughes was informed that Mr. Young would not perform, and perhaps it would be fitting that I say that Mr. Young under his contract with us had a right to refuse this—we went into this deal because one of the facets of the deal was that Young would perform, but his own contract with RKO, aside from this Ann Sheridan picture, provided that he might have as many as two pictures submitted to him, and if he canceled out as many as two, then we might cancel the commitment. So

(Testimony of Sid Rogell.)

while we might have brought more pressure to bear in this particular instance, his own individual contract with the company permitted him to say no, and therefore we didn't pursue that. We went on and looked for other casting.

When I told Mr. Hughes that Young was not going to do the picture or didn't want to do it, he felt as I did that it wasn't a catastrophe——

Q. Mr. Rogell, I suggest to you that your conferences [405] with Mr. Hughes and what he may have said to you are not admissible here in evidence.

A. I was just going to get at what was said then as to how we arrived at submitting who we wanted to take the place of Robert Ryan—Robert Young if he wanted it.

Q. You can tell us what you did in that respect or what you said to Miss Sheridan and Mr. Hickox.

A. Following that I suggested that they consider either Mel Ferrer or Robert Ryan to replace Robert Young.

Q. Did you make this suggestion at some conference that you had at your office?

A. Yes.

Q. What did Miss Sheridan and Mr. Hickox say in that respect?

A. They were not immediately impressed with the idea of using either one. I think Miss Sheridan knew little or nothing about Mel Ferrer at the time. He was and still is a comparative newcomer, but he had made a big hit in one picture, and was sub-

(Testimony of Sid Rogell.)

sequently put under contract to RKO. Robert Ryan they knew something about, but would look at film, and subsequently did.

Q. Had Mr. Ryan made some pictures for RKO prior to that time?

A. Mr. Ryan made several pictures for RKO.

Q. And were you familiar with the work that Mr. Ryan had done at the studio?

A. Very familiar.

Q. And were you of the opinion at that time that Mr. Ryan was good casting for this part in this picture?

A. My opinion is that he would have been excellent in the part.

Q. And Mr. Ferrer, you say, had made only one picture at that time?

A. He may have made more pictures, but I am only aware now of one picture in which he had appeared as an actor. He has directed some pictures.

Q. What was your opinion of his ability as an actor?

A. I think he is a fine actor, but I frankly shared Miss Sheridan's opinion about him for this role and didn't press for her to accept Mel Ferrer. I suggested him, as I was instructed to, but I could not enthusiastically insist that he was right for the part. I didn't feel that way about Ryan.

Q. You say you didn't feel that way about Ryan. How did you feel about Ryan?

A. As I have just said here, I felt Ryan would be fine in that part.

(Testimony of Sid Rogell.)

Q. Did you express that opinion to Miss Sheridan?
A. On several occasions. [407]

Q. Was this question of the appointment of Robert Ryan or Ferrer discussed with Miss Sheridan on more than one occasion?

A. Would you repeat that, please?

Q. Was this matter of the appointment of Ryan or Ferrer to this part in the picture discussed with Miss Sheridan on more than one occasion?

A. Yes, sir, it became the bone of contention for several weeks during which we had many meetings.

Q. During the course of these meetings was the name of any other actor suggested by you to Miss Sheridan?

A. Yes, during these meetings we would suggest other players for the part to her and she in turn to us.

Q. Will you give me the names of some of these other players that were suggested or proposed by you?

A. We first of all hoped to sell for the part either Ryan or Ferrer, but did suggest as an alternate Robert Preston, whom we thought could play it very adequately.

I on one occasion suggested John Lund, a player under contract to Paramount Studios.

In the latter meetings out of desperation I suggested Charles Boyer, not enthusiastically, but just threw the name out, as I say, out of desperation.

Miss Sheridan thought it had some merit, and even though I didn't feel that it was going to go

(Testimony of Sid Rogell.)

very far we decided to [408] find out if the man was even available or in this country, which is the first thing to do. There is no use talking about an actor that you can't get.

Q. Is that all that was said about Charles Boyer?

A. No; his name was mentioned, bandied around from then on, but never taken very seriously, in my opinion.

Q. What about Basehart, was his name mentioned?

A. Yes, Basehart's name was mentioned, and I am trying to think of some of these other names.

We suggested Basehart as being a possibility for the part. He, too, is rather a newcomer. He certainly was a couple of years ago when this took place.

Q. Van Heflin?

A. Van Heflin was mentioned, and Miss Sheridan didn't think that he was quite right for the part.

Q. What did you think about Preston? Were you familiar with his work, Mr. Rogell?

A. Yes, I am very familiar with Preston's work. I had just used him in a picture which I had personally produced for RKO, called "Blood on the Moon," in which Robert Mitchum and Bob Preston were costarred. I thought he was not only the type, he is a big, virile, handsome man, he has a very good circulation—by that I mean he has played with important people, and I can't remember when he had less than costar billing, which is important

(Testimony of Sid Rogell.)

from a picture [409] standpoint. In "Blood on the Moon" he did a very fine job, and because a year or so ahead of that he had played in a picture with Gregory Peck called "The Macomber Affair," which has been referred to here, he came off very well in very fast company. People, so to speak, thought he stole the picture. And that was the picture I thought if Miss Sheridan would look at she would find more favor in her consideration of him than having seen him in this western, because it was a little closer to what he had to do in the "Carriage Entrance" part.

The Court: Did you hear what Mr. Stevenson said about the character of Quentin or Mark Lucas?

The Witness: Yes.

The Court: It was a character that had an element of weakness in him?

The Witness: Yes.

The Court: Would you use a big, virile man in that kind of a part?

The Witness: Yes, you can. As a matter of fact, the picture that I am talking about, "The Macomber Affair," he played a cowardly husband who went out—this is a Hemingway classic—who went out to Africa to prove that he wasn't afraid to hunt tigers, to prove to himself. So it was a case in point, if I may say so. But the virility of the man, the fact that he is big, there is a certain characteristic [410] facially in these people that sometimes comes through. Preston is about the same size as Mitchum who finally played it, and

(Testimony of Sid Rogell.)

who it has been testified here everybody would have loved to have had in the part. So the size of the man physically didn't have too much to do with it.

Q. (By Mr. Knupp): Do you recall, specifically, Mr. Rogell, what Miss Sheridan or Mr. Hickox said with respect to these proposals that you made? For instance, let's take Ryan, what did Miss Sheridan say about Ryan?

A. Well, Miss Sheridan—unfortunately, the first film that Miss Sheridan saw of Mr. Ryan were some scenes from a picture he had just finished called "The Set-Up" in which he played a broken-down prize fighter with cauliflower ears, and it was just the portrait of a broken-down fighter, and it certainly wasn't proper for her to try to expect from what she saw on the screen that this was the man to play something completely different.

We later on tried to reinterest her with more suitable film, such as "Bed of Roses."

Q. She saw "Bed of Roses" or part of it, did she not? A. She did eventually, yes.

Q. What sort of role did Ryan play in that?

A. In "Bed of Roses" he played the romantic lead opposite Joan Fontaine, an adventuress, devil-may-care writer, romantic, exciting, we hope, we thought. [411]

Q. Did she express any opinion about Ryan after she saw it?

A. She thought that was better, but she still didn't think he was right for the part.

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(Testimony of Sid Rogell.)

Q. Did she say why she didn't think he was right?

A. Well, I believe she did say he is too rugged or too virile, or words of that kind. Nothing too specific.

Q. Do you recall what she said with respect to Ferrer?

A. She thought Ferrer was a very good actor, but not right for this part.

Q. What about Preston?

A. Preston she didn't think was a very good actor and didn't think he was right for the part.

Q. Did she express any opinion of Van Heflin?

A. I don't recall.

Q. Now, Mr. Rogell, were these actors who have been named, Ryan, Ferrer, Basehart, Preston, and Van Heflin, all available for this part?

A. I am sure that they were at the time or we couldn't have been considering them seriously.

Q. Do you recall how long these conversations continued? You said they started shortly after the 12th of July, 1949; do you recall how long they continued?

A. Well, they continued intermittently every two or three days, it seems to me, until the day after the meeting [412] with Mr. Hughes, which I believe was August 16th.

Q. The meeting with Mr. Hughes was on August 15th.

A. The following day they came up and looked at film, and I believe that was the end of the dis-

(Testimony of Sid Rogell.)

cussions.

Q. Do you know how this meeting with Mr. Hughes was arranged?

A. The meeting with Mr. Hughes was arranged as a result of Mr. Hickox calling me and saying that Ann would like to see Howard. And I called Mr. Hughes and told him that, and believe it or not, we got in there that afternoon.

Q. Who was present at that meeting?

A. I think Mr. Hughes, Miss Sheridan, Mr. Hickox, and myself. I believe that was all.

Q. Do you recall the conversation that occurred at the meeting? A. Yes, quite well.

Q. Will you state to the jury as nearly as you can the substance of what was said at that meeting and by whom?

A. Well, after the usual social amenities were exchanged, Mr. Hughes asked Miss Sheridan if she wouldn't reconsider her turn-down, so to speak, of both Ferrer and Mr. Ryan, why wouldn't she use them, and she in turn wanted to know why he wouldn't consider her request to use Franchot Tone.

I think those were the only names involved seriously at [413] the time, except—pardon me—Robert Preston.

We were only there 10 or 15 minutes. It ended up with Mr. Hughes persuading Miss Sheridan to come to the studio the following day to look at excerpts from certain films in which these three players had appeared.

I was to, in order not to run the whole of all of

(Testimony of Sid Rogell.)

these pictures, to select certain reels from a picture called "Caught," in which Robert Ryan had appeared, certain scenes from "Bed of Roses" for both Ryan and Ferrer, they were both in that picture, scenes which I don't believe Miss Sheridan had seen theretofore, and it was probably my suggestion that she look at "The Macomber Affair," or some of it for Robert Preston.

Miss Sheridan agreed that she would do it, and we were going to get together the next day and look at the film.

That is, in essence, what happened.

Q. What sort of a picture or what sort of a role had Ryan played in "Caught," do you recall?

A. Yes, in the picture "Caught" he was an industrial tycoon. It was a modern picture, it wasn't a western or anything, and he was aggressive, strictly an individual. I don't know how else to explain it without trying to relate the story.

Q. Did the name of Franchot Tone come into the conferences that you had with Miss Sheridan and Hickox at any [414] time prior to this meeting with Mr. Hughes?

A. Yes, the name of Franchot—

Q. When was the name of Franchot Tone first brought into the discussions?

A. The first time I heard Franchot Tone's name mentioned in connection with this picture was an occasion when I was walking from my automobile in the morning to my office, I passed Mr. Sparks' office and he saw me coming and stopped me, and

(Testimony of Sid Rogell.)

we went inside for a moment in the morning, and he said, "Ann Sheridan would like us to consider Franchot Tone for the lead in this picture." And I said, "Well, right offhand I don't think that is very important casting."

He said, "Well, they are old friends, she ran into Tone here on the lot, Tone was on the lot in another capacity, and she would like us to consider him very seriously, she is quite anxious to have him."

Q. And did you submit his name to Mr. Hughes?

A. I did. I felt at the time that Sparks and I were in accord that he wasn't very exciting casting for this part. I suggested it to Mr. Hughes, and he didn't care for it at all.

Q. And did you convey that information to Miss Sheridan? A. Yes, I did. [415]

Q. And did she thereafter again ask for the assignment of Mr. Tone to this role?

A. Yes.

Q. Just tell me what her attitude was, if you will, Mr. Rogell, with respect—as evidenced by her conversation with you—with respect to the assignment of Mr. Tone to this role.

A. From the time that Mr. Tone's name was submitted by Miss Sheridan to me or through Mr. Sparks, she was adamant about having him in the part, and on every occasion——

Q. Just a minute. This word "adamant"——

Mr. Gang: Also, Mr. Knupp asked you to state

(Testimony of Sid Rogell.)

the conversations, not attitudes or opinions, please.

The Witness: I am sorry.

The Court: All right. The jury will disregard the conclusion of the witness. The word "adamant" and so forth may go out.

Q. (By Mr. Knupp): Just state what she said in these various conversations with you with respect to Franchot Tone.

A. In every meeting that we had concerning the leading man Miss Sheridan repeatedly asked for Mr. Tone, and we would sit and discuss different people and different occasions and she would still end up saying she wanted Tone.

Q. During all these meetings that you had with Miss [416] Sheridan and Mr. Hickox did she ever indicate her approval to you of anybody except Tone?

A. No. On the occasion, as I said, when Boyer's name was mentioned, or suggested very late in these discussions, she did listen and gave me the impression that that had some merit and we should go further. In other words, she might have accepted Mr. Boyer. She didn't just say "No" immediately when he was mentioned. But to the others she had said, "No," pretty consistently.

Q. And that was as far as the consideration of Boyer went?

A. Yes, because we ourselves in mentioning it didn't take it very seriously, and it was really suggested to indicate that we were trying our utmost to find other names regardless of where they might

(Testimony of Sid Rogell.)

come from, just not to put the whole matter of casting aside but to show our indication of wanting to continue to find other people, if possible.

Q. I understand that this meeting with Mr. Hughes took place on August 15th, and on the following day Miss Sheridan and Mr. Hickox came to the studio to look at some film. Will you tell us what occurred on that occasion?

A. They came over to the studio, I find according to my notes, after lunch. I took them up to the projection room in the same building above my office and they were to look at these films which had been mentioned. They were [417] only up there probably 20 minutes, or possibly——

Q. Was there anybody with them at the time?

A. Not to my knowledge. I don't recall that there was anybody with them, just the two. I didn't feel, when they came back to my office, 20 to 30 minutes later, that they had had time to see all of the films which they had agreed to look at, and that proved to be the case. Miss Sheridan came into my office and said, "I have seen this film of Ryan and I still don't like him for the part. Ferrer isn't right for it. I want Tone."

I said, "What about Preston?"

She said, "He isn't right for it. I didn't even look at the film."

Q. Did anything else occur at that time so far as you can now recall?

A. Nothing that stands out in my memory except that she ended up saying she wanted Tone.

(Testimony of Sid Rogell.)

And when they did leave my office I was under the impression that this was just——

Mr. Gang: Just a moment.

Mr. Knupp: Just a moment.

Mr. Gang: I am interested in impressions, but unfortunately it is not good evidence.

The Court: Counsel have been very decent on both sides about objections, but we have to——

The Witness: I am sorry. [418]

Q. (By Mr. Knupp): At this time in August of 1949 what was the situation with respect to Robert Mitchum as to his availability?

A. Well, he was in a picture and scheduled to go into one, if not two, immediately upon getting through with that picture. He was scheduled for several pictures by the studio. Presumably not available.

The Court: By RKO?

The Witness: RKO, yes.

Q. (By Mr. Knupp): What eventually happened with respect to those pictures in which he was scheduled to appear? A. Well——

Q. What I am getting at is this, Mr. Rogell: Mr. Mitchum according to the evidence here was assigned to "Carriage Entrance" and commenced the production of the picture—commenced the performance of his services in the picture about the 26th of September. What happened between the time, the date in August to which you have referred, and the date in September when he commenced to perform his services?

(Testimony of Sid Rogell.)

A. Well, he had to finish the picture that he was in.

Q. In August?

A. I believe he was in a picture "Holiday Affair" at that time, and scheduled, we thought, to go into a picture [419] called "Jet Pilot" upon completing that picture. It developed that we put John Wayne into "Jet Pilot," and because this picture didn't go as we had hoped with Miss Sheridan, we put him in "Carriage Entrance" when it got before the camera.

The Court: By "him" you mean Mitchum?

The Witness: Mitchum, yes.

Q. (By Mr. Knupp): Was there any particular reason why the studio wouldn't have wanted to assign Mr. Mitchum to the same picture with Miss Sheridan?

A. Why the studio wouldn't want to?

Q. Yes.

A. Mitchum, in the first place, was busy, as we have related here, and we felt that with Miss Sheridan we could use a less valuable, less costly, less important leading man.

Q. In other words, with the services of Miss Sheridan she would carry the picture?

A. With an adequate leading man.

Q. And you felt that Robert Ryan was such an adequate leading man?

A. We thought so, yes.

Q. When did Miss Ava Gardner become available for this picture, when was she employed?

(Testimony of Sid Rogell.)

A. When it appeared that the picture was—the whole [420] project was stopped because we couldn't get together on leading men, we found ourselves casting in desperation. The sets were all built, and so on, a lot of people had been hired, the staff, mostly, and I believe that Mr. Hughes made this arrangement personally with Metro-Goldwyn-Mayer.

Q. Do you mean that Miss Gardner was employed by Metro-Goldwyn-Mayer?

A. She is under contract to Metro-Goldwyn-Mayer.

Q. And was borrowed from that studio for this express part? A. That is my impression, yes.

Q. And that happened, of course, sometime after the contract with Miss Sheridan was terminated?

A. That is correct.

Q. Do you know how long after the termination of the contract with Miss Sheridan that was?

A. I believe there was a period of 10 days or two weeks when we didn't know what was going to happen, or whether we were going to go ahead or abandon the picture, or just what the result would be.

Mr. Knupp: I think that is all.

The Court: We will take our afternoon recess at this time.

Ladies and gentlemen of the jury, remember the admonition of the court not to converse about this case among [421] yourselves or with others or form or express any opinion on the merits until the case

(Testimony of Sid Rogell.)

is finally submitted to you for your verdict. The jury may retire.

Court will now recess.

(A recess was taken.)

The Court: The record will show that the jury are in their proper places.

Mr. Gang: Agreed.

The Court: Proceed, Mr. Gang.

Cross-Examination

By Mr. Gang:

Q. I think you said that this deal originally came to RKO as a package.

A. That is my recollection, yes.

Q. Were the original negotiations with you or Mr. Tevlan?

A. I believe the original negotiations were with Mr. Tevlan.

Q. Did you have anything to do with those negotiations, Mr. Rogell, in 1948?

A. I don't believe so, no.

Q. I think you said the package consisted of the story, Mr. Banks, Miss Sheridan, and Robert Young?

A. I believe that is right.

Q. I understood you to say that one of the reasons you [422] were interested was that it gave you the opportunity to use up some commitments?

A. That is correct.

Q. One of them was a commitment with Mr. Melvyn Douglas?

(Testimony of Sid Rogell.)

A. That developed later, but it became an essential incentive for us.

Q. At the time the deal was negotiated the commitment that you were using up was Robert Young, is that right? A. That is correct.

Q. Were you a party to the negotiations which resulted in the contract between Mr. Banks' corporation and RKO in the early part of '49?

A. I was.

Q. Were you also active for the defendant when the contract was terminated by RKO?

A. Active in what capacity?

Q. In the steps which were taken which resulted in the termination by RKO of the contract with Polan Banks Productions?

A. I personally had nothing to do with the legal procedure.

Q. I meant as an executive, not as a lawyer. I know you are not a lawyer. [423]

A. I don't quite know how to answer that, Mr. Gang.

Q. Were you personally deputized to do anything with reference to the actions which resulted in the termination of the contract between RKO and Polan Banks Productions?

A. I was not.

Q. Do you remember——

A. Are you talking about the termination of this deal?

Q. The one that preceded this one, Mr. Rogell.

(Testimony of Sid Rogell.)

The Court: The contract between Polan Banks and RKO.

The Witness: I don't think so. I don't recall what happened there, as a matter of fact.

Q. (By Mr. Gang): Were you aware of litigation being filed by Polan Banks Productions, Inc., against RKO in March of 1949?

A. That's right, I remember that.

Q. Does that in any way refresh your recollection as to the events which preceded that law suit, of your own knowledge? If you don't know, say so.

A. I remember, if I may think out loud.

Q. Please.

A. That the original deal didn't jell for some reason, and that Mr. Goldstone prevailed upon me to try to take the thing over, as we subsequently did, as an RKO venture, because Polan Banks had sunk a lot of money into it, he was [424] willing to take Sparks or someone else as a producer with him, et cetera, and I threw my weight on that side and tried to put the thing back on the track. Is that what you mean? A. Yes.

Q. You came into the thing after there was litigation? A. That is correct.

Q. And you were acting for RKO in arranging matters so that the litigation was settled?

A. That is right.

Q. And part of the settlement was what you have just described as taking over the venture by RKO, is that right? A. Correct, that is right.

Q. You mentioned the fact that the casting of

(Testimony of Sid Rogell.)

stars is the function in most studios of the top executive, Mr. Rogell?

A. I believe that is standard practice, yes.

Q. And in that respect, Mr. Hughes functioned for RKO? A. That is correct.

Q. He was the top executive?

A. That's right.

Q. And final decisions on these matters were made by Mr. Hughes? A. Correct.

Q. And the final decision as to who would direct the picture had to be approved by Mr. [425] Hughes? A. That is right.

Q. There was during the time here in question a committee which functioned at RKO Studios on Gower Street, is that correct, Mr. Rogell?

A. Up to a time, yes.

Q. I speak from the time April 29th to and including September 1, 1949. Wasn't there a committee which met once or twice a week?

A. When Mr. Hughes took over he turned the activities of the studio over to a committee, of which I was one facet, a committee of three. That committee ceased to function, I believe, in October, '48.

Q. And what happened after that?

A. After that, because one of the facets of that committee, Mr. Tevlan, had left the studio and did not return until after I left the studio, the committee no longer functioned as a committee, but I was responsible to Mr. Hughes with other people advising me, including Mr. Youngman and Mr.

(Testimony of Sid Rogell.)

Lockhart, who were on the committee. To the best of my recollection the committee as such ceased to function about October, '48.

Q. And from that time on you had sort of a sub-committee which advised you and you took the matters up with Mr. Hughes, is that fair?

A. No, I wouldn't say that. I was really running the [426] show under Mr. Hughes. I conferred with other people there as it was necessary, but there was no other sub-committee.

Q. Running the show, in your own words, Mr. Rogell, did you designate Mr. Stevenson to direct "Carriage Entrance"?

A. After conferring with Mr. Hughes, he would tell me that he approved of that, and I would instruct whoever was concerned.

Q. Instead of making it general, will you tell me what you did?

A. I did. I was telling you how it worked.

Q. In this particular case do you remember where you saw Mr. Hughes? A. No, I don't.

Q. Was it on the phone, perhaps?

A. It could have been.

Q. It is a fact that Mr. Hughes at no time function on the RKO lot, isn't that so?

A. To the best of my knowledge he did not functioned on the RKO lot, isn't that so?

Q. And you either saw him at the Goldwyn Studios or elsewhere? A. That is correct.

Q. On these matters would you say that Mr. Hughes had the final word?

(Testimony of Sid Rogell.)

A. Exactly. [427]

Q. I direct your attention now, Mr. Rogell, to the first third of July, 1949, when Mr. Young bowed out of "Carriage Entrance"—

Mr. Knupp: Third of July?

Mr. Gang: The first third of July. I think that is close enough for my purposes.

Q. (By Mr. Gang): It was during that period of time that you first learned from Mr. Goldstone that Mr. Young would not play the part?

A. Correct.

Q. And your testimony was that you first heard it over the telephone? A. That is correct.

Q. I understood you to say that Mr. Goldstone commented on the script? A. Right.

Q. What did he say?

A. He told me on the phone that particular morning that he was sorry to tell me that Robert Young did not choose to play the part; that he had read the script and despite his original enthusiasm for it he thought that his part had been impaired or played down; he thought that the whole script had been improved and didn't think that we should go and change the script to build his part up again, but that he would just like to be excused from doing it. [428]

Q. What did you say to Mr. Goldstone?

A. I told Mr. Goldstone that we were certainly disappointed to hear it and we would take it under advisement. Something general of that kind. It was rather a shock.

(Testimony of Sid Rogell.)

Q. I understood you also to say that you did not pursue Mr. Young, words to that effect?

A. That is correct.

Q. You earlier said one of the reasons you took this property over was that it gave you an opportunity to get rid of a commitment with Mr. Young?

A. To use up a commitment we had with him, yes.

Q. Was there any reason why you didn't pursue Mr. Young?

A. In my own opinion I didn't think it became a formidable problem. I thought it would be reasonably simple to replace Mr. Young.

Q. Did you inform Mr. Hughes of the occurrence? A. I did.

Q. What did he say? A. I believe——

Q. If you remember.

A. I believe he told me to try to get Miss Sheridan to accept either Mel Ferrer or Bob Ryan.

Q. Did you use the phrase "try to sell her on Mel Ferrer or Robert Ryan"? [429]

A. Yes, I believe that is motion picture terminology.

Q. You did have a talk with Miss Sheridan about Mel Ferrer and Robert Ryan, you said?

A. I did.

Q. And Miss Sheridan talked to you again after she saw some film in which Mr. Robert Ryan appeared? A. Right.

Q. And in which Mr. Ferrer appeared?

A. Yes.

(Testimony of Sid Rogell.)

Q. I understood you to say that you agreed with her about the unsuitability of Mel Ferrer for the role?

A. In my opinion, he was not ideal casting. I believe he could have played it, but I couldn't have the enthusiasm for it that others had, and I couldn't honestly press her to take him.

Q. Was this first conversation with reference to the replacement before or after you had heard of the possibility of Franchot Tone playing the role?

A. I believe that the discussions about Ferrer and Ryan preceded any discussion of Tone.

Q. And I understood you to say that you first heard about Tone when Mr. Sparks told you on the lot——

A. That is right.

Q. ——that Ann Sheridan had asked for Tone, is that right? [430]

A. That is the impression I have.

Q. Were you in court when Mr. Sparks testified?

A. I was.

Q. Do you recall his testifying that he first mentioned the name of Franchot Tone?

A. I heard him say that.

Q. Is it possible that he told you that he suggested the name to Ann Sheridan and she had approved?

A. It is possible. But I am under the impression that he told me that Miss Sheridan had run into him on the lot and suggested him.

Q. I also understood you to say that he was not enthusiastic about Mr. Tone?

(Testimony of Sid Rogell.)

A. I believe that we were both in accord that wasn't ideal casting.

Q. But you did submit it to Mr. Hughes?

A. I did.

Q. When you submitted it to him did you submit it with or without recommendation?

A. I believe without recommendation.

Q. What did Mr. Hughes do?

A. He negated the idea, he didn't think it was exciting casting and said so.

Q. Did he do so before or after he talked to Mr. Depinet in New York? [431]

A. That I don't recall.

Q. Did you hear—

A. I don't think he checked Mr. Tone's name with Mr. Depinet in New York. I think he asked us to do that on one or two occasions.

Q. Did you check with Mr. Depinet on Mr. Tone?

A. I—either I checked with him or perhaps Mr. Youngman did. One of us were on the phone with Mr. Depinet in New York two or three times a week, and it would be something put down for the New York call. We got the answer back that Ann Sheridan supported by Franchot Tone and Melvyn Douglas would sound like a reissue or not very exciting casting, or at any rate, it would present, if not sales obstacles, nothing that would help them in selling the picture.

Q. Did you convey that information to Miss Sheridan?

(Testimony of Sid Rogell.)

A. It was conveyed to her either through me, Sparks, or someone.

Q. You had in your desk during your reign at RKO a little black book called the Audience Research Institute Book? A. Right.

Q. Do you recall an occasion with Miss Sheridan looking in the book to see what the respective box office ratings as shown by that book [432] were? A. I do.

Q. And it is a fact, isn't it, that Mr. Tone's rating was equivalent to Mr. Ryan's?

A. I think it was even higher.

Q. Even higher? A. Yes.

Q. Did you convey that information to Mr. Depinet or Mr. Hughes?

A. I did. But that to them wouldn't mean what it might to someone not in the industry.

Q. In other words, they weren't influenced by the A.R.I. report?

A. Influenced to an extent, but it is not a bible. May I ad lib for a moment.

Q. Please.

A. We are in a position of knowing when we put Robert Ryan into a part, even though the A.R.I. may give him a rating of 10, and maybe Tone 15, that we have four completed pictures with Ryan, one opposite Colbert, one opposite Fontaine, that are still unreleased, which by the time this picture is shown he will have a higher rating. Furthermore, we are using something belonging to RKO, enhancing his value by using him opposite

(Testimony of Sid Rogell.)

Sheridan. Therefore this book doesn't mean very much.

Q. From your point of view, and my question does not [433] indicate that it is a wrong point of view, from your point of view one of the factors that entered into your mind in casting this role was not the best man available, but the best man from the point of view of RKO; is that a fair statement?

A. I think he was the best man available, and certainly he was the best man from RKO's point of view.

I might say we wouldn't miscast it in order to help the corporate values.

Q. All other things being equal, you would give the preference to the man who was under contract to RKO, is that right? A. By all means.

Q. And all other things being equal, as between Robert Ryan and Robert Mitchum, both of whom were under contract to RKO, you would rather put Mr. Ryan in to build him up in a picture that Miss Sheridan starred in? A. That's right.

Q. You said Mr. Ryan at that time was a less important man than Mr. Mitchum?

A. We consider him less important at the box office.

Q. You did not attempt to segregate these various discussions between the first third of July and the 16th of August in your direct, and I assume that was because you find it difficult to do so in your own opinion, is that right? [434]

(Testimony of Sid Rogell.)

A. I will try, if you guide me. I didn't find that I had any occasion to.

Q. I will if it will help. I only asked that so if possible I would like to have you try to break it down to specific dates and meetings.

I would like to know roughly when the name of John Lund was in the picture the first time. In other words, after or before Ryan and Ferrer were suggested?

A. After Ryan and Ferrer were suggested, and after Miss Sheridan suggested Tone, we started to exchange names with each other.

Q. Now, you did not say, so I will ask you. When you asked about the availability of Tone, had you been informed that Miss Sheridan approved him?

A. That Miss Sheridan had approved Tone?

Q. Lund. If I said "Tone" I meant "Lund."

A. Perhaps I didn't hear you right. When I suggested Lund to Miss Sheridan I got the impression she didn't know John Lund. He is quite new, or was at that time, and she had been in Europe, and she didn't give it very much consideration. I thought it was a good enough suggestion that I asked Mr. Schuessler in our casting office to ascertain Mr. Lund's availability.

I believe later on and before our negotiations had terminated, that Miss Sheridan did learn more about Mr. Lund [435] and would have considered him favorably, had it been possible.

I think at that time he was unavailable.

(Testimony of Sid Rogell.)

Q. Do you remember that Paramount turned the part down because of the script?

A. I believe that was the case.

Q. Did you tell that to Miss Sheridan? If you remember.

A. I don't remember. I really don't.

Q. Do you remember the name of Wendell Corey in the discussions? A. Yes.

Q. Who suggested Wendell Corey?

A. I don't recall.

Q. Do you recall whether or not anything happened with reference to Wendell Corey?

A. I just remember his name being in this maze of names, and what happened with him I don't recall. We wouldn't be very excited by Wendell Corey.

Q. Have you any recollection about Richard Conte?

A. I believe to the best of my recollection that Miss Sheridan suggested Richard Conte.

Q. Do you remember what you did?

A. I didn't think he was very important casting. I didn't think he was important enough to take up with Mr. Hughes until we ascertained his availability. By that I mean [436] I didn't want Mr. Hughes to say, "Yes," and then go and find out from Twentieth Century-Fox, to whom he was contracted, that he wasn't available. So I asked Mr. Schuessler to ascertain his availability. Mr. Schuessler, I believe, found out that Twentieth-Century-Fox wouldn't even tell you whether or not he was available until they read the script.

(Testimony of Sid Rogell.)

By that time I believe our interest in Mr. Conte was so ephemeral that we didn't even want to go to the trouble of sending them a script, because once you send them a script you have in effect said, "We want your man," and then you come back and say to Mr. Zanuck, "We don't know whether we want him to play the part or not," and you have created a bad piece of public relations. So we didn't send the script.

Q. You are now referring to Richard Conte?

A. Yes.

Q. Plaintiff's Exhibit 20, you were in court when this was introduced, in which the note was read, "Send script when S. R. gets H. H. approval," that is the script you are referring to?

A. I wasn't here when that was read, but that sounds all right.

Q. I thought you heard it.

A. I wasn't here when this was read.

Q. I will show it to you. [437]

You have looked at Plaintiff's Exhibit 20, and does that refresh your recollection of a discussion with Mr. Schuessler about the request of Fox for a script in connection with Richard Conte.

A. Yes.

Q. Now, with your recollection refreshed, did you talk to Mr. H. H. about getting his approval to send a script?

A. I don't recall. I may have. I don't recall, but it occurs—it seems to me that it developed that either Hughes or I, or both of us, were not enthu-

(Testimony of Sid Rogell.)

siastic enough about Conte to have sent the script over.

Q. Did you tell Mr. Hughes that Miss Sheridan had suggested him?

A. Yes, I am sure we did.

Q. Did Mr. Hughes know that she had indicated she would approve of John Lund?

A. I don't believe that I ever told Mr. Hughes that Miss Sheridan would accept John Lund. If I did, it came very late in our negotiations.

The Court: Mr. Hughes was the last word on these things, is that right?

The Witness: That's right.

The Court: You just told Mr. Hughes those things which you thought he ought to know?

The Witness: Well, I wouldn't want to sell him your [438] Honor, or try to persuade him to use somebody which the producer and director and I all thought was wrong, bad casting, or for whatever reason. I believe we did inform him——

The Court: If Mr. Hughes said, "This is it," it didn't make any difference what the directors or the producers or the executive producers or the casting director or anybody else thought, if Mr. Hughes said, "This is it," that went?

The Witness: That is pretty much the truth.

Q. (By Mr. Gang): Directing your attention again to the period of time when the name of Franchot Tone was the subject of discussion, do you remember talking to Mr. Tone's agent?

A. Yes, I do.

(Testimony of Sid Rogell.)

Q. From what I gather, Mr. Goldstone was his agent also? A. No. This was Mike Levee.

Q. Another agent was the agent for Mr. Tone. And you talked to Mr. Levee, did you not?

A. I did.

Q. And this was sometime towards the end of July, 1949?

A. This was within a few days after the refusal on the part of Robert Young.

Q. Sometime in July? A. Yes. [439]

Q. And was the subject of the discussion with Mr. Tone's agent the amount of money that he would want to play the part?

A. I remember that vaguely. I know it is specific in here——

Q. I haven't referred to that, Mr. Rogell, because your recollection has been pretty good.

A. I think Mr. Tone's salary at the time was \$50,000 per picture, is that correct?

Q. I don't remember. I only want to see if you remember. A. I don't, frankly.

Q. You do remember a discussion about the amount of money that Mr. Tone would want if he played the part?

A. Yes. They were quite anxious for him to play the part.

Q. And this discussion took place before the turn-down by Mr. Hughes, is that right?

A. That's right.

Q. You have referred to the fact that your deposition was taken in December of '49. Do you re-

(Testimony of Sid Rogell.)

member at that time having a memorandum before you in which you had a notation dated August 2nd, 1949, about Mr. Ryan for Ann Sheridan, do you remember that? If you don't, if you will look at page 48, line 3, to refresh your recollection. [440]

A. Yes, I do remember.

Q. Does that refresh your recollection now, having that note before you, as to what brought the name of Bob Ryan back into the discussion on the 2nd of August?

A. So far as I can remember, Bob Ryan's name was in here, in these negotiations, and every discussion with Miss Sheridan at every meeting from the time that we learned that Robert Young was not going to perform, I don't think that we ever had a meeting that we didn't try to persuade her to favorably consider Robert Ryan.

Q. Do you remember a notation of August 8, 1948, about Mel Ferrer? That is on page 50, line 23, Mr. Rogell.

A. Yes, I did discuss Mel Ferrer with Miss Sheridan.

Q. Now, those dates, do they reflect discussions over the telephone with Mr. Hughes?

A. Yes, they do.

Q. And it is a fact, as you have stated, that in this particular case "Carriage Entrance," the decisions were being made by Mr. Hughes and not by you or Mr. Sparks?

A. These decisions in which we are all interested here were all being made by Mr. Hughes.

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(Testimony of Sid Rogell.)

Q. Your next note was August 11, 1949, Richard Basehart. Can you remember what that discussion was with Mr. Hughes about the possibility of Mr. Basehart playing the role? [441]

A. Is that mentioned here?

Q. Yes. That is on page 52, line 19, if you want to look at it to refresh your recollection?

A. I recall mentioning Richard Basehart to her.

Q. You don't have any other recollection at this time about that discussion either with Miss Sheridan or Mr. Hughes about Basehart?

A. Well, these routine meetings were going on back and forth, and there was nothing particular except that on each occasion a new name would be introduced and discussion had about it.

Q. There was a note with no date on it, which is referred to on page 53, line 15, "Sheridan-John Conte-11"; you meant Richard Conte, did you not, Mr. Rogell?

A. No, I have never met him in my life.

Q. Did you mean Richard Conte?

A. Did I mean him?

Q. Yes.

A. I thought you said did I meet him.

Q. Was that a misstatement on your part, or did the reporter get the wrong name?

A. No, that was the right name.

Q. John Conte?

A. It must have been Richard Conte, I beg your pardon. John Conte is a radio actor, I believe. I probably said John [442] Conte.

(Testimony of Sid Rogell.)

Q. The memorandum is sometime on or after August 11th, is it not?

A. It says August 11th exactly, on line 8, page 53.

Q. So that or about that date you did have under discussion the possibility of Richard Conte playing that role?

A. It was at this time that Miss Sheridan came to us presumably, if my memory serves me, and asked us to consider Richard Conte. I believe this was her suggestion and not ours. I am not sure.

Q. And the 11, if you remember, stood for what?

A. Meaning that was his rating in that particular book.

Q. A.R.I. book? A. A.R.I. book, yes.

Q. You said on direct examination that sometime shortly prior to August 15th, 1949, which was a Monday, you received a call from Mr. Hickox in which he stated that Miss Sheridan would like very much to speak to Howard. You meant Howard Hughes? A. Correct.

Q. Did she say why she wanted to speak to Mr. Hughes?

A. The inference was pretty plain.

Q. Did he say? [443]

A. I don't think he said. He said, "Ann would like to have you arrange for her to see Howard."

Q. If I heard you correctly you said, believe it or not, you made the date that afternoon, which was Monday? A. That is correct.

(Testimony of Sid Rogell.)

Q. Was it a fair inference on my part that it was difficult to make dates to see Mr. Hughes?

A. Quite difficult.

Q. And, as you said before, you had to make a date to see him elsewhere other than the RKO lot?

A. Right.

Q. In this instance you had to go to the Samuel Goldwyn Studios where he had a private office?

A. That is where he maintains his own office.

Q. And you told Mr. Hickox to meet you there with Miss Sheridan?

A. Right.

Q. Late that afternoon you did meet there, is that right?

A. Right.

Q. And how did you get into the lot? Did you drive?

A. I drove in the automobile gate and instructed them to do likewise. I waited for them, and then they followed my car in to the back door to Mr. Hughes' office, which is a little hard to find. [444]

Q. And you went to the back door of Mr. Hughes' office?

A. That is the normal way of entering his office. It is a little easier when you have driven on the lot.

Q. Was there any signal which admitted you, Mr. Rogell?

A. Just knocked on the door.

Q. Who opened the door?

A. Mr. Hughes.

Q. Was anybody there at the time besides Mr. Hughes?

A. Not to my knowledge.

(Testimony of Sid Rogell.)

Q. And the three of you went into the office?

A. We did.

Q. Did you relate your entire recollection of the conversation on direct examination to the best of your ability?

A. Except things which I thought were irrelevant.

Q. Would you say that when Mr. Hughes greeted Miss Sheridan it indicated that they had known each other for some time?

A. I thought they had known each other.

Q. Did they call each other by their first names?

A. Yes.

Q. Did Mr. Hughes make any remark about war paint on Miss Sheridan? [445]

A. I didn't recall that, but I don't deny it. It sounds like Howard.

Q. Do you remember Miss Sheridan saying she didn't come to have any quarrel, she came to get him to give her a leading man for the picture?

A. I do.

Q. And the subject of the entire meeting was Miss Sheridan's plea to Mr. Hughes to get a leading man so the picture could go forward, that was the subject of the discussion?

A. Yes, that is what we were there for.

Q. Do you remember the names of various leading men that were mentioned by Miss Sheridan in that meeting?

A. To the best of my recollection Miss Sheridan at that meeting indicated that she had consid-

(Testimony of Sid Rogell.)

ered everybody that we had recommended and she would still like to have Franchot Tone play the lead in the picture.

Q. Did she say that she also approved John Lund?
A. I don't recall that.

Q. Did she mention Richard Conte?

A. She very well may have, it is quite possible.

Q. In particular did she say, "Howard, why don't you give me Bob Mitchum?"

A. It is quite possible that she did. I don't remember. [446]

Q. And if she did, Mr. Hughes said no?

A. If she did Mr. Hughes must have said, "He is not available."

Q. I think you said that Mr. Hughes asked Miss Sheridan as a favor to him to look at some more film on Ryan, Ferrer, and Preston, to see if she wouldn't change her mind about their suitability?

A. That is correct.

Q. Did he say anything about how cooperative she had been?
A. I don't recall.

Q. Did he say——

A. But may I interject one thing? Mr. Hughes speaks in a very inaudible tone of voice; he is very hard of hearing, and when you meet him you have to practically get in his lap, and what he was saying to Ann I couldn't hear three feet away. So some of these things I couldn't hear, honestly.

Q. You could notice their attitudes, however?

A. Yes, it was all very friendly.

Q. When the meeting broke up, it broke up

(Testimony of Sid Rogell.)

on a friendly note, did it not? A. Exactly.

Q. Mr. Hughes was not angry with Miss Sheridan and she wasn't angry with him? [447]

A. Not at all.

Q. And she said she would look at the film the next day, Tuesday? A. Right.

Q. And you have stated that you arranged for her to look at that film? A. Right.

Q. And you escorted Miss Sheridan to the projection room where film was run? A. Right.

Q. And on Tuesday afternoon you have stated she come back to your office after seeing the film?

A. Right.

Q. And told you that having looked at the film again her opinion still was that these people were not, in her opinion, suitable for that role, is that right? A. That's right.

Q. Now, I would like you, if you can, to cast your mind back to that Tuesday afternoon, Mr. Rogell. It is quite clear in your mind that they came to your office right after looking at the film?

A. Right.

Q. Isn't it a fact that it was at that meeting that for the first time the name of Charles Boyer was mentioned, Tuesday afternoon, August 16, 1949, and didn't you mention it? [448]

A. I did mention it, but whether it was that meeting or not I don't recall. It seems to me it might have been—I know it was very late in our negotiations. If it wasn't that meeting, it was certainly one of our very late meetings.

(Testimony of Sid Rogell.)

Q. After having refreshed your recollection with reference to the meeting at Mr. Hughes' place, Boyer's name was not mentioned?

A. It wasn't mentioned at Hughes' office at all.

Q. And it wasn't mentioned in your office on Tuesday, August 16th?

A. That I don't recall. It very well may have been.

Q. Do you remember calling Mr. Schuessler to come to your office?

A. On that particular day?

Q. Yes, Tuesday, August 16th.

A. I am sure that I did, but I don't remember it. Schuessler has testified that I did.

Q. May I suggest to you that he came and told you that Mr. Boyer was available, or that he might be available, and that you at that time told him to check and see if he was available, is that right?

A. I believe it is, yes.

Q. Also, on that occasion you discussed whether or not he would play this part which had been turned down by so many people; that is possible that you did discuss that? [449]

A. Yes, very possible.

Q. And somebody said—whether it was you, or Mr. Schuessler, or Miss Sheridan—that as long as he got the girl he would take the part?

A. I heard that here in the court room, but I didn't hear it before.

Q. You don't remember now that it was said on that occasion?

A. No. But I believe that is possibly true.

(Testimony of Sid Rogell.)

Q. You mean that the statement was made, or that the statement was true?

A. I believe at that time Mr. Boyer might have been had, because his career has been beset with many problems for the last couple of years. I believe we could have had him had we tried.

Q. When Miss Sheridan left the room she had indicated to you that Boyer would be agreeable to her?

A. When Boyer's name was mentioned on this occasion, if it was this occasion, Miss Sheridan did not say no. She thought that the suggestion had merit and indicated that she would consider him, and we should go further in ascertaining availability, et cetera.

Q. For the purpose of refreshing your recollection only, will you look at page 97 of your deposition, line 5, Mr. Rogell? [450] A. Right.

Q. At line 5, we were looking at your memorandum dated August 16, 1949. You will notice in line 13 you said there was a question mark opposite Charles Boyer's name? A. Yes.

Q. Does that refresh your recollection that the question mark was put there on that date by you as a possibility that he might be available?

A. Well, just as it says here, evidently I had discussed Boyer with Hughes, and he said, "If you want to, ask Ned," meaning check on this suggestion with Mr. Depinet. So, presumably, if I may continue, we discussed Boyer before this memorable day of August 16th.

(Testimony of Sid Rogell.)

Q. The memorandum is dated August 16th, is that right?

A. Yes, but I would have had to have talked about——

Q. Is it possible that memorandum was made after you talked to Miss Sheridan and indicated a discussion with her?

A. I guess it is. They are so vague I wouldn't like to say that it isn't possible.

Q. On that same date, August 16th, if you will look at the bottom of page 97 for the purpose of refreshing your recollection. You don't have those notes with you, by any chance, do you [451]

A. No, I don't.

Q. Under date of August 16th, that's true, you have a note which reads, "Our Legal Department tells me that if we do not make a deal because we can't get her to approve a leading man that we are under no obligation to her, that this is our opinion." Do you remember writing that note down?

A. Yes.

Q. Was that after Miss Sheridan had left your room on the 16th of August, Tuesday?

A. Right.

Q. When did you consult your Legal Department to get such an opinion? Before or after Miss Sheridan got there?

A. After Miss Sheridan left my office she went to Mr. Youngman's office.

Q. Who told you she went to Mr. Youngman's office?

(Testimony of Sid Rogell.)

A. Mr. Youngman and others, but certainly Mr. Youngman.

Q. It was that afternoon that you talked to your Legal Department, is that right?

A. That afternoon we had our regular Tuesday meeting when this matter, which was certainly important, was discussed at length. I said, "What position are we in?" And they gave me this kind of an opinion.

Mr. Gang: Thank you, Mr. Rogell.

The Court: Are you through with this witness, Mr. Knupp? [452]

Mr. Knupp: Just a few questions, if the court please.

Redirect Examination

By Mr. Knupp:

Q. Mr. Rogell, you were asked about this memorandum that you made on the 16th about instructions you had from your legal department. Do you recall whether or not that memo was made after you had talked with Mr. Youngman?

A. It was.

Q. And made after he had talked with Miss Sheridan and Mr. Hickox? A. Yes.

Q. And did he tell you the result of his conference with Miss Sheridan and Mr. Hickox?

A. He did.

Q. Before you wrote that memorandum did Mr. Youngman also tell you the result of certain conversations he had had with Mr. Banks?

(Testimony of Sid Rogell.)

Mr. Gang: If the court please, it probably is preliminary. I object to any conversations had outside the presence of the plaintiff, so we don't get into a wrangle.

Mr. Knupp: I want to show, if the court please, that counsel has apparently attempted to leave the impression that this memorandum was made as soon as Miss Sheridan left his office. I think I am entitled to show, in view of that circumstance, certain intervening happenings and certain [453] information.

The Court: You can show events or happenings, but that is different from asking for the conversation.

Read the question, Mr. Reporter.

(The last question was read by the reporter.)

The Court: You may answer that yes or no. Did Mr. Youngman make a report to you on certain conversations he had had, without telling us what the conversations were, did he or did he not?

The Witness: Yes, he did.

The Court: The record should show that I overruled your objection made to that particular question.

Q. (By Mr. Knupp): Mr. Rogell, in this meeting with Mr. Hughes did Miss Sheridan indicate, as far as you now recall, that she would approve anybody for this role except Franchot Tone?

A. No, but she was very friendly and certainly cooperative, agreed willingly to look at this film.

Q. Did Mr. Hughes tell her at that time that

(Testimony of Sid Rogell.)

the studio had invested a large sum of money in this film and ask her if she wouldn't as a favor to the studio look at this film of Ryan and Ferrer again? A. He did.

Q. And see if she couldn't change her opinion with respect to them and approve one of them as the leading man [454] in this role?

A. He did.

Q. At the time the meeting broke up Miss Sheridan agreed she would go down to look at the film to see whether or not she could comply with Mr. Hughes' request? A. That is correct.

Q. When she came back to your office on the 16th after looking at the film, what did she say to you with respect to the matter of approving either Mr. Ryan or Mr. Ferrer?

A. She said she still didn't like Ryan, that Ferrer wouldn't do. And there was another film involved. Shall I mention that?

Q. Preston?

A. I said, "What about Preston?" And she said, "I didn't even bother to look at that. He is not right for it."

Mr. Knupp: That is all.

Mr. Gang: No further questions.

The Court: Just a minute. I would like to ask a question or two, and counsel may object to my questions, and I am liable to sustain an objection to my own question.

Mr. Knupp: I won't object to it unless I think the court will sustain the objection.

(Testimony of Sid Rogell.)

The Court: Facetiously, there is the old story of the judge asking the questions, and the lawyer inquired, "Your [455] Honor, are you asking this question for my benefit or for the benefit of my opponent. If you are asking it for my opponent's benefit, I object, and if you are asking it for my benefit, I withdraw the question."

As I understand it, Mr. Rogell, Young originally bowed out of this picture because the script had been modified after he had originally looked over either the novel or the first script?

The Witness: That is correct.

The Court: And he apparently felt that the part had been cut down in size or stature, is that right?

The Witness: That is what he said.

The Court: Now, subsequently your script was rewritten several times to again build the part up, is that right?

The Witness: That's right.

The Court: Did you ever go back to Young and say, "Look, you originally were interested in this picture, we have now rebuilt the part, it is a bigger part than it used to be, will you look at it again and see if we can't go back to where we were at the time we bought this package deal"?

The Witness: I didn't, your Honor, but efforts were made through Sparks, and I believe Banks, to contact Bob Young and to sell him or try to get him to reconsider his turning the role down, to find out what it was he objected to, presumably

(Testimony of Sid Rogell.)

to try to correct something, do anything [456] within reason to please him and yet not distort the picture. We were never able to effect such a meeting.

The Court: This is something that you didn't do yourself?

The Witness: No, I didn't.

The Court: But you had reports from your subordinates that attempts had been made?

The Witness: That is correct. Frankly, if I may continue, we never realized that this would be so important or we certainly would have pressed harder to get Mr. Young into the picture.

The Court: Well, around the 17th of August it began to appear pretty important to you, didn't it?

The Witness: It did. But it never occurred to us to go back and get Young into the picture.

The Court: On or about the 16th of August was your last conversation with Miss Sheridan?

The Witness: That's right.

The Court: Did you or any other executive of RKO at that time say to her, "Well, now, Miss Sheridan"—in substance—"we have come to the end of the rope, we are going to propose a certain actor for this picture, and you take that actor or leave it and we are at the end of our negotiations," was anything said that would indicate to her that you were at the end of your negotiations and [457] that the following day you were going to terminate her contract?

(Testimony of Sid Rogell.)

The Witness: Not to my knowledge.

The Court: At all times in the dealings you had with Miss Sheridan you had in mind, did you not, that under this contract that then had been entered into between Miss Sheridan and RKO, that there had to be eventually a meeting of the minds on this male lead—did you have that in mind?

The Witness: As a matter of fact, her contract gave her approval of the leading man, and we entered into it because we had both immediately approved Robert Young. And then when Robert Young failed to perform we were both sort of up in the air as far as our legal rights were concerned, because before the paper was signed we had already approved and met that problem. Here we are with everything else ready to go, she had the approval of the leading man, and presumably we have the right to approve, as well.

The Court: In other words, to your mind it was a situation where the minds had to meet?

The Witness: Yes, that's right. And I really thought we could get together.

The Court: I have no further questions.

Mr. Knupp: May I ask one question?

The Court: Yes, you may.

Q. (By Mr. Knupp): Mr. Rogell, when you say you understood that there [458] had to be a meeting of the minds, you mean that you understood that Miss Sheridan had to approve of your selection of a leading man before she was bound to perform her part, was that your understanding of the contract?

(Testimony of Sid Rogell.)

A. My understanding of the contract is that she had certain basic agreements or approvals, one of which was leading man, another was director, et cetera.

Q. But so far as the actual selection of the leading man was concerned, you didn't understand that you had to secure a leading man that she suggested?

A. No, no, I didn't think that. I thought she would have to select one out of several that might be——

Q. Proposed by you?

A. Proposed by the studio.

Mr. Knupp: That is all. I have no further questions.

Mr. Gang: No questions.

The Court: Step down, Mr. Rogell.

May the witness be excused, or do you want him around?

Mr. Knupp: I think he may be excused, if the court please.

The Court: Well, we didn't get very far today, did we? How many more witnesses do you have?

Mr. Knupp: We have three or four, but their testimony will be very brief. I think so far as we are concerned we can be through by noon tomorrow. I hope so. [459]

Mr. Gang: My rebuttal will be very short indeed.

The Court: Is there any possibility that we get to the argument in the afternoon on this case?

Mr. Knupp: It depends, I think, to a consider-

able extent on how much time we spend with the court on the matter of instructions.

Mr. Gang: May I state that I had Mr. Rudin stay at the office and work on our instructions so we could be in a position to discuss them with you when your Honor was ready for it. It will save that much time.

Mr. Knupp: I think if it meets the court's convenience we certainly would have no difficulty in getting the matter in such shape so that it can be argued and submitted to the jury Monday afternoon, if that would meet the court's calendar.

The Court: I think we had better not try to hurry, make waste by trying to hurry too fast. We will have some time to spend on the instructions, and even if we succeeded in working that end of it out we would be instructing the jury late Friday at the very best.

I think we had better figure on closing up the evidence tomorrow and spending what time we need to on our end of it, and then have the jury back possibly Monday at 1:30 or 2:00, or Tuesday morning.

Mr. Gang: Whatever suits the court's convenience.

The Court: We will see tomorrow. [460]

Ladies and gentlemen of the jury, remember the admonition of the court not to form or express any opinion on this matter until it is finally submitted to you for your verdict, and you are not to communicate among yourselves or with anyone else on any matter touching the merits of this case. Keep

your mind open until the case is finally argued and until you are finally instructed as to the law and it is submitted to you for your decision.

You are excused until 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the court room.)

The Court: Anything further tonight?

Mr. Gang: No, your Honor.

Mr. Knupp: No, your Honor.

(Whereupon on Thursday, February 1, 1951, an adjournment was taken to Friday, February 2, 1951, at 10:00 o'clock a.m.) [461]

Friday, February 2, 1951, 10:00 A.M.

The Court: The record will show that the jurors are present and in their proper places.

Mr. Gang: So stipulated.

Mr. Knupp: Mr. Banks.

POLAN BANKS

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

The Court: You have already been sworn, Mr. Banks.

The Witness: Yes, sir.

Direct Examination

By Mr. Knupp:

Q. Mr. Banks, did you have some discussions with Miss Sheridan with respect to who should be

(Testimony of Polan Banks.)

substituted for Robert Young in the leading role of this picture?

A. Yes, sir, but the discussions took place mostly in Mr. Sparks' office when we were discussing the actors that have been mentioned in court already.

Q. Did you have any discussions with her outside of Mr. Sparks' office?

A. I believe once or twice on the telephone we talked about it.

Q. Did you have any discussions with her about Franchot [463]Tone?

A. I frankly don't remember.

Q. You don't recall whether or not during any of your discussions outside of the presence of Mr. Sparks Miss Sheridan said anything to you about Franchot Tone or about his being substituted in this part?

A. To the best of my recollection I think she did say once or twice that she thought he would be good for the part if we couldn't get someone else.

Q. You were present, Mr. Banks, when certain film was shown to Miss Sheridan and Mr. Hickox?

A. Yes, sir.

Q. Particularly calling your attention to the date of August 16th, were you present on that occasion?

A. Yes, sir, I was.

Q. Do you recall what film was shown to Miss Sheridan and Mr. Hickox at that time?

A. To the best of my recollection right now I think we saw part of "The Macomber Affair" and we saw some more film on Ryan.

(Testimony of Polan Banks.)

Q. Anything in which Ferrer appeared?

A. Yes, something in which Ferrer appeared. I forget exactly what it was.

Q. Where did you see this film?

A. In projection room 2 of the studio. [464]

Q. Who was present when the film was being shown?

A. Just Miss Sheridan, Mr. Hickox, and myself.

Q. About how long were you in there?

A. To the best of my recollection, about 15 minutes, I figure, 10 or 15 minutes.

Q. So what part of any of these films you saw, and I think you mentioned only two, you saw within the period of 15 minutes?

A. About that. It may have been a little longer. Around that time.

Q. Was anybody else in the projection room as far as you can now recall except Miss Sheridan, Mr. Hickox and you? A. No, sir.

Q. Did you on that occasion have any discussion with Mr. Hickox?

A. Yes, as we were leaving the projection room Miss Sheridan walked ahead of us and went to the water cooler, I remember the projectionist stopped by to talk to her, and Mr. Hickox made some remark, I don't remember the exact wording, but he made a remark——

Mr. Gang: Just a moment. May I take the witness on voir dire, your Honor? I assume what you are going to say is a conversation with Mr. Hickox outside the hearing of Miss Sheridan.

(Testimony of Polan Banks.)

The Witness: Yes, it was. [465]

Mr. Gang: Therefore I ask the court for a ruling for him not to volunteer any testimony of any conversation outside the presence of the plaintiff.

Mr. Knupp: If the court please, our position in that respect is that it amply appears from the evidence here that Mr. Hickox was the representative, employee, of Miss Sheridan. She herself has testified that she introduced him at the studio as her business manager. She has testified that he was regularly in her employ at a fixed salary and had been for fourteen years, and that he accompanied her on all of these trips to the studio and took part in all of these discussions.

Mr. Youngman has already testified that when they came to his office on the afternoon of August 16th, Mr. Hickox did all of the talking with respect to what the situation was and what was going to be done about it.

Now, the law is clearly established, if the court please, that the declarations of an agent or representative of a party, even without the presence of the party, are admissible in evidence. That is the code rule, and that has been established by a long series of decisions.

Once the representative character of the party has been established his declaration or statements outside of the presence of the party are admissible in evidence. That is the code rule, and that is the effect of all of the decisions, [466] if the court please.

(Testimony of Polan Banks.)

It seems to me that it is very apparent here that Mr. Hickox was taking an active part in all of these negotiations on the part of Miss Sheridan, and under the law we are entitled to have his declarations or statements made in connection with a possible settlement of this controversy.

The Court: I have your point. I don't think it is going to do any good to argue further, Mr. Gang, but I am going to make a ruling that you won't like. If you want to be heard further I will let you be heard.

Mr. Gang: I don't think it is that important, but I want the record to be clear that the only evidence is that he was the business manager to take care of checks, insurance, and there is no evidence showing any authority on the part of Mr. Hickox to make any commitments, contractually or otherwise, for her, and on that ground I object to any conversation, and I let the matter rest there.

The Court: The objection will be overruled, because there has been sufficient foundation, evidence from which a jury might believe, if they so desired, that Hickox had the capacity that Mr. Knupp contends for. On the other hand, the evidence is in such state that a jury might find otherwise. They might find that this man had no authority to bind Miss Sheridan. The question before me is whether there is enough evidence in the way of foundation to let this statement in, [467] and I am merely holding that there is enough evidence shown from which a jury might believe that this man was an agent who

(Testimony of Polan Banks.)

was authorized to act for Miss Sheridan in all these matters, in which event you could give what credence you wanted to to his statement.

I am not deciding, however, that you must so find. You may find that his capacity as a business agent was such that he had no authority to bind her in any way with any of these statements, in which event you may reject the proffered testimony.

Do I make myself clear?

So my ruling only consists of the fact that a sufficient foundation has been laid to let this bit of evidence into the record.

A Juror: It is a question of scope of his authority?

The Court: Yes, that is the question you are going to have to decide, the scope of his authority. You have heard the evidence.

The Juror: Yes.

Mr. Knupp: What is the question?

(The record was read by the reporter as follows:

“Q. Did you on that occasion have any discussion with Mr. Hickox?

“A. Yes, as we were leaving the projection room Miss Sheridan walked ahead of us and went to the water cooler, [468] I remember the projectionist stopped by to talk to her, and Mr. Hickox made some remark, I don’t remember the exact wording, but he made a remark——”)

The Court: The objection will be overruled. Go ahead and complete it.

(Testimony of Polan Banks.)

The Witness: To the best of my recollection the remark he made was something to the effect that it looked as if we had reached a deadlock, as if the picture might never be made, and he asked if I thought it was possible that the studio might want to get someone else in place of Miss Sheridan, and if they did would it be likely that they would be willing to pay her \$50,000 to bow out of the contract. And I said as far as I would imagine I didn't think they would.

That was the end of the discussion on that.

Q. (By Mr. Knupp): Did you after that discussion with Mr. Hickox have some conversation with Mr. Youngman?

Mr. Gang: Just a moment. I object on the ground it is calling for hearsay, immaterial and irrelevant, incompetent so far as the plaintiff is concerned.

Mr. Knupp: My position, if I may state it to the court, in that respect is that subsequent to the time that this conversation which the witness has just testified occurred the action which the studio took in terminating the contract was taken that same day, and—I don't know, I could make [469] my point outside the presence of the jury if the court thought it was advisable. I don't want to prejudice the plaintiff in any way by a statement here that the court might rule to be incompetent.

The Court: I will hear you at the bench. I don't see now how it could be competent.

(Testimony of Polan Banks.)

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Knupp: My point on that situation is that after this conversation between this witness and Mr. Hickox that the witness talked to Mr. Youngman and told him of this conversation, and that that is material because it is made to appear now, apparently made to appear, that without any further statement to Mr. Youngman the termination of the contract was decided upon. I think we are entitled to show the basis upon which the studio proceeded and the information it had at the time that it proceeded in order that the jury may know what the situation was that induced this notice of termination.

If that doesn't go into the record, then the jury is left with a completely false impression with respect to just what the situation was so far as what those in authority at the studio knew concerning Miss Sheridan's refusal to perform. It seems to me that it is a vital issue in the case because of the fact—— [470]

The Court: What you propose to ask is the conversation between Banks and Youngman?

Mr. Knupp: I propose to ask this witness whether or not he conveyed the information he secured in this conversation to Mr. Youngman.

The Court: If you ask just that one question, what he did, "Did you pass on to Youngman what you heard from Hickox?" I think that is proper.

Mr. Gang: I am still objecting.

(Testimony of Polan Banks.)

The Court: But if you ask for the conversation, that is out. It is one of those strange situations, Mr. Gang, that although it sounds like hearsay, actually what a man is doing is asking as to an act.

Mr. Gang: I have authority from the Ninth Circuit in the case of *Lester Cole v. Loew's Incorporated*, in which the very same problem came up with reference to what motivated the defendant in discharging Cole, and the Ninth Circuit said, and I quote:

“We think that the manner in which appellant”——

That is Loew's Incorporated, the employer.

“came to be persuaded to take the action which it obviously did is wholly without hearing on the case. As respects the action taken, and the right to take it, such matters are as irrelevant as would be a transcript of the debates in its director's [471] meetings.”

That language is the law.

Insofar as we are concerned in this case, all that the jury has to know is that we were fired, and the record is clear as to what happened. What motivated them, whether they wanted to save money, whether they thought it would be a better picture, whether they didn't like Miss Sheridan, that is of no importance whatever, because all we are concerned with is what did they do.

I say, again——

The Court: But you have a situation where the mental state, you admit, is an issue.

(Testimony of Polan Banks.)

Mr. Gang: Not in the way you have limited the damages. The issue of good faith only came in if we could get to the jury to find out that paragraph 29 with reference to minimum compensation was out of the contract, in which the question of good faith would be relevant so that the jury could then give us \$150,000 and 10 per cent.

The Court: Good faith is still in the case.

Mr. Gang: Not insofar as this point is concerned, your Honor.

The Court: I see what you mean. Good faith is in it only insofar as the acts of the parties in trying to get together on a leading man.

Mr. Gang: That's right. That is our position. [472]

Mr. Knupp: That is the point we get to now, if the court please. I wouldn't attempt to introduce this conversation for the purpose of proving the truth of what Mr. Banks has testified to, but I think on this issue of good faith if we leave this thing in the air where a jury is going to find that Youngman before he decided on terminating this contract knew nothing excepting what they had told him, that we haven't given the story to the jury.

The Court: I will permit you to inquire as to whether this information was passed on, but not as to the conversation itself.

Mr. Gang: The objection is in the record. Need I object again?

The Court: No, it is in the record.

(Whereupon the proceedings were resumed within the hearing of the jury as follows:)

Mr. Knupp: What was the last question?

(The question referred to was read by the reporter as follows: "Did you after that discussion with Mr. Hickox have some conversation with Mr. Youngman?")

The Witness: Yes, I did.

Q. (By Mr. Knupp): Did you convey to Mr. Youngman the conversation you had with respect to Mr. Hickox? A. Yes, I did.

Mr. Knupp: I think that is all. [473]

Mr. Gang: No questions, Mr. Banks.

Mr. Knupp: Mr. Youngman.

GORDON E. YOUNGMAN

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

The Clerk: You have been sworn.

The Witness: Yes, sir.

Direct Examination

By Mr. Knupp:

Q. Mr. Youngman, what, exactly, was your position at the studio, RKO?

A. Well, I was vice-president in charge of commitments and business administration. I had charge of the business aspects of the operation, but not

(Testimony of Gordon E. Youngman.)

anything to do with the talent aspects or so-called artistic aspects of the operation.

Q. You are an attorney-at-law yourself?

A. I am, yes, sir.

Q. And are you now connected with the defendant?

A. No, I am not.

Q. When did you sever your connection with them?

A. December 31, 1950.

Q. How long had you been with RKO in the capacity in which you have indicated? [474]

A. At what time? Do you mean when I severed my connection?

Q. I mean prior to the time—yes, how long had you been employed there at the time you severed your connection?

A. Nearly 21 years.

Q. And in what capacities had you acted for the defendant during that period of time?

A. I was assistant secretary and assistant general counsel from 1930 to 1941, I was vice-president and general counsel from 1941 to 1949, I was vice-president in charge of commitments from 1949 to the middle of 1950, and I was vice-president in charge of the studio from June, 1950 to December 31, 1950.

Q. Prior to August 16th had you had any conversations with anybody either representing the plaintiff or the defendant with respect to the casting of this picture?

A. No, sir, I hadn't had any conversations with anyone. I had heard Mr. Rogell discuss the casting a couple of times, but I hadn't discussed it with

(Testimony of Gordon E. Youngman.)

him. I had been in his presence when he did discuss it.

Q. Would the matter, Mr. Youngman, of the approval of the script by Mr. Robert Young be a matter that would be in your jurisdiction?

A. No, sir.

Q. If Mr. Young had approved the script, is that a [475] matter which you would have information about?

A. I probably would have known about it, yes.

Q. To your knowledge did Mr. Young ever actually approve the basic screen play for this story, I mean approve it to the defendant RKO?

A. I don't know, Mr. Knupp.

Q. So far as you had any information there was never any formal approval by Mr. Young of the basic story?

A. I had no information of that fact. I just don't know.

Q. I show you, Mr. Youngman, a carbon copy of a letter which is unsigned and ask you if you can identify that letter.

A. Yes, I remember this letter being sent.

Q. And that letter is one which was written by you to Mr. Robert Young?

A. It was signed by me; it wasn't prepared by me.

Q. But it was signed by you in the regular course of your duties at the studio?

A. That's right; I used to sign all instruments going out of the studio.

(Testimony of Gordon E. Youngman.)

Mr. Knupp: I would like to have this marked, if the court please, as a defendant's exhibit.

The Clerk: In evidence?

The Court: That is the defendant's first exhibit, isn't [476] it?

The Clerk: Yes. This will be A.

The Court: Any objection?

Mr. Gang: No objection.

The Court: Received in evidence as Defendant's Exhibit A.

(The document referred to was marked Defendants' Exhibit A, and was received in evidence.)

Mr. Knupp: May I read this letter to the jury, if the court please? It is not very long.

The Court: You may.

Mr. Knupp: It is dated July 7, 1949, addressed to Mr. Robert Young, care of Nat Goldstone Agency, 9121 Sunset Boulevard, Los Angeles 46, California.

"Dear Mr. Young:

"Enclosed herewith is a 146-page screen play entitled "Carriage Entrance," which screen play was written by Marion Parsonnet based on the novel "Carriage Entrance" by Polan Banks, and which screen play is indicated as being a 'budget script' and which is dated July 7, 1949.

"We are submitting this screen play to you for your approval as the basic story for the next Picture provided for in our employment

(Testimony of Gordon E. Youngman.)

agreement with you dated September 13, 1945. The [477] role proposed for you to play in connection with the enclosed screen play is that of 'Quentin Cushing.'

"Please note that the enclosed screen play is designated as a 'budget script' and we, of course, reserve the right to change this script so long as we do not change the basic story.

"Kindly acknowledge the submission of this screen play for your approval as the basic story for the next Picture under the employment agreement by signing in the space indicated on the copy of this letter and returning such copy so acknowledged to us."

Q. (By Mr. Knupp): To your knowledge, Mr. Youngman, that was the first submission of a screen play by the studio to Mr. Young?

A. I think so.

Q. Did you receive a reply to that communication from Mr. Young?

A. I don't remember.

Q. I show you a letter dated July 11th addressed to RKO Pictures, Inc., Attention Gordon E. Youngman, and apparently signed by Robert Young through his agent Nat C. Goldstone; I ask you whether or not that letter was received [478] by you in the regular course of your duties in the studio?

Mr. Gang: I will so stipulate, Mr. Knupp.

Mr. Knupp: That is all. You don't need to answer the question.

(Testimony of Gordon E. Youngman.)

The Court: It is stipulated the letter was received.

Mr. Knupp: We ask that that be marked as Defendants' Exhibit next in order.

The Court: B received in evidence, Defendant's B. You may read it.

(The document referred to was marked Defendant's Exhibit B. and was received in evidence.)

Mr. Knupp: This letter, ladies and gentlemen of the jury, reads as follows:

It is dated July 11, 1949, RKO Radio Pictures, Inc., 780 Gower Street, Los Angeles 38, California.

"Gentlemen:

"Attention: Gordon E. Youngman.

"This will acknowledge receipt of your letter of July 7, 1949, together with which you submitted to me for approval the story entitled 'Carriage Entrance' as the proposed basic story for a picture under my employment agreement with you dated September 13, 1945.

"This is to notify you that I am hereby rejecting and disapproving of such submitted story [479] in conformity with the provisions of my employment agreement with you.

"Yours very truly,

"ROBERT YOUNG

"By NAT C. GOLDSTONE,
Agent."

(Testimony of Gordon E. Youngman.)

Q. (By Mr. Knupp): At the time this script was submitted to Mr. Young and this letter returned, did RKO have an employment contract with Mr. Young? A. Yes, it did.

Q. I show you, Mr. Youngman, a written agreement between RKO Radio Pictures and Robert Young, dated September 13, 1945, and ask you if that is the contract to which you refer.

A. Yes, sir, it is.

Mr. Knupp: If the court please, this contract is a very formidable document. There is really only one provision in the contract in which we are interested, and if Mr. Gang has no objection I have made an excerpt from the contract which covers paragraph 3 of the contract and which relates to the provision for approval or disapproval by Mr. Young of any basic story that may be submitted.

Mr. Gang: I have no objection whatever.

The Court: What you propose to use or read is paragraph 3, or whatever the paragraph is, rather than submit the whole document in evidence? [480]

Mr. Knupp: I beg your pardon?

The Court: You propose to use or to read this particular paragraph, rather than to offer the whole contract in evidence?

Mr. Knupp: Yes, if the court please. I think it would unnecessarily encumber the record.

The Court: You may do it either way you want to. You may offer it in evidence and then read it.

Mr. Knupp: I would like to offer it in evidence.

The Court: Defendant's Exhibit C will be the extract—of what paragraph, Mr. Knupp?

(Testimony of Gordon E. Youngman.)

Mr. Knupp: Paragraph 3.

The Court: Paragraph 3 of the contract between Robert Young and RKO.

(The document referred to was marked Defendant's Exhibit C, and was received in evidence.)

Mr. Knupp: I would like to read this provision of the contract so that they may know what we are talking about.

This provision is contained in the contract between the parties, and this provision relates to the right of approval or disapproval by Mr. Young of any basic story that is submitted to him. It is rather long, but I think it probably should be before the jury and reads as follows:

"Each of the pictures shall be based upon an approved basic story selected as herein [481] provided. The corporation will submit to the Artist one or more proposed basic stories for each picture. Such basic stories may be in the form of synopses, treatments, stories, books, plays or in any other literary form. Within five (5) days after the Corporation has submitted a basic story to the Artist, the Artist will notify the corporation in writing of his approval or disapproval of the proposed story. Failure to indicate approval or disapproval within said five (5) days shall constitute approval. The Artist agrees to exercise such right of approval reasonably and in good faith.

(Testimony of Gordon E. Youngman.)

“If the Artist disapproves of one (1) story the Corporation will, unless the Artist has previously approved a story for the Picture involved, submit a second story which shall be subject to the approval or disapproval of the Artist in the same way.

“If the Artist disapproves of two (2) stories submitted to him for his approval for a picture and has not approved a story for such picture, the Corporation at its election may either terminate the employment of the Artist [482] with respect to the Picture involved, or the Corporation may extend the current one (1) year period for such period as the Corporation elects, but for not more than six (6) months. Such election may be made by the Corporation by notice in writing to the Artist at any time before the expiration of such current one (1) year period, as the same may have previously been extended.”

There are additional provisions, if the court please, but I think the pertinent part of the paragraph with respect to approval or disapproval is included in what I have read to the jury.

Q. (By Mr. Knupp): Mr. Youngman, you had some conversation on August 16th in your office with Miss Sheridan and Mr. Hickox?

A. Yes.

Q. Is that the first conversation that you had with these parties or either of them with respect to this matter?

(Testimony of Gordon E. Youngman.)

A. No, I believe I talked to Mr. Hickox on the telephone one time before that about the extension of the time to commence the picture.

Q. But this is the first conversation you had had with respect to casting for the picture?

A. Yes. [483]

Q. And where did this conversation occur?

A. In my office.

Q. And who was present?

A. Mr. Hickox, Miss Sheridan, and me.

Q. Will you relate to the jury the conversation which then occurred indicating what was said as nearly as you can recall by each of the parties present?

A. Mr. Hickox told me that Miss Sheridan's contract had been taken over from Polan Banks when RKO made a deal with Polan Banks, and Robert Young had turned down the screen play, and Miss Sheridan was supposed to have approval of the leading man, that the studio had submitted Robert Young—Robert Ryan, Robert Preston, Mel Ferrer, and Richard Basehart, and Miss Sheridan did not approve any of them, it didn't look as if the picture was going to start and he would like to know what the studio's position was going to be. I said, well, I had nothing to do with casting pictures, and this was out of my line, but I would look into it.

Miss Sheridan said that she would approve Franchot Tone, and I believe she or Mr. Hickox said that Mr. Sparks had submitted Franchot Tone.

(Testimony of Gordon E. Youngman.)

And then one of them also said that Mr. Rogell was endeavoring to obtain Charles Boyer.

Q. Is that the substance of all the conversation you had at that time? [484]

A. Yes, Miss Sheridan said she had seen some film of some of these men and she didn't like them and couldn't approve them, and she wanted someone with a better name than most of them had, a better known name.

That's about all.

Q. Do you know whether or not that conversation occurred before or after the conversation which Miss Sheridan and Mr. Hickox had had with Mr. Rogell that same day? Did they indicate they had been in Mr. Rogell's office?

A. I don't recall that they did.

Q. Did you after that conversation—what did you do, Mr. Young?

A. I first telephoned Mr. Banks and asked him to come over to my office.

Q. Did he come? A. Yes.

Q. What happened then?

A. I asked him—

Mr. Gang: Just a moment. I think this is going somewhat beyond what we discussed at the bench, your Honor. I object to any conversation between the witness and Banks, both employees of the defendant, outside the presence of the plaintiff, as incompetent, irrelevant and immaterial.

The Court: We haven't gotten to that point yet.

(Testimony of Gordon E. Youngman.)

The question is did he come over to your [485] office.

Mr. Gang: I thought the question was "What happened then?"

The Court: What was the question?

(The last question was read by the reporter.)

The Court: Objection sustained to the question in that form.

Q. (By Mr. Knupp): I will ask you specifically, Mr. Young, did Mr. Banks relate to you a previous conversation that he said he had had with Mr. Hickox?

Mr. Gang: Same objection, your Honor.

The Court: Overruled.

A. Yes, he did.

Q. (By Mr. Knupp): And after that conversation with Mr. Banks what did you next do, Mr. Youngman? A. I telephoned Mr. Sparks.

Q. Did he tell you of his negotiations with Miss Sheridan?

A. I didn't ask him of his negotiations with Miss Sheridan; I asked him——

The Court: Now, wait. Answer that question yes or no.

The Witness: No, he did not.

Q. (By Mr. Knupp): You talked to Mr. Sparks about the situation? A. Yes.

Q. Did you talk with anybody else? [486]

A. Mr. Rogell.

Q. And all of these conversations occurred on the afternoon of August 16th? A. Yes, sir.

(Testimony of Gordon E. Youngman.)

Q. And the notice terminating the contract is dated August 17th; do you know when that letter was written and sent out, Mr. Youngman?

A. Yes, sir.

Q. When was that?

A. I would say between 4:00 and 5:00 o'clock on the afternoon of August 17th.

Q. That was all subsequent to these conversations that you had with employees of the studio to which you have just referred? A. Yes, sir.

Mr. Knupp: I think that is all, Mr. Youngman.

Cross-Examination

By Mr. Gang:

Q. In that letter from Mr. Young rejecting the script, you note that was signed by his agent?

A. Yes, by Mr. Goldstone.

Q. In your files have you ever found anything concerning Miss Sheridan's contract signed by Mr. Hickox, to your knowledge?

A. Not to my knowledge. [487]

Q. The answer is——?

A. Not to my knowledge.

Q. In the excerpt from Mr. Young's contract to RKO I heard the phrase that his right was to be exercised reasonably and in good faith, and that you had the opportunity to present a second story to him, is that right?

A. I don't recall the exact language of it. I think that is what Mr. Knupp read, yes.

(Testimony of Gordon E. Youngman.)

Q. In other words, there was some second chance provided for?

A. I believe so, Mr. Gang. I can't swear to it.

Q. You don't remember? A. No.

Q. You said you didn't know whether Miss Sheridan and Mr. Hickox had seen Mr. Rogell before they came to your office on the 16th of August in the afternoon, is that right?

A. I don't recall whether they said they had or whether they hadn't. The first thing that I remember is my secretary announced they were outside and wanted to see me.

Q. Isn't it a fact that when the name Charles Boyer was mentioned Miss Sheridan had said that they had talked to Mr. Rogell earlier that afternoon and he had suggested Mr. Charles Boyer?

A. You are right, you are right. At the end of the conversation she said he was trying to get Mr. Boyer. [488]

Q. And you said on direct examination this morning that either Mr. Hickox or Miss Sheridan asked you under the existing circumstances which had been related to you what was the studio's position going to be? A. Yes.

Q. Now, that came after a rather lengthy recital of what had transpired prior thereto, is that right?

A. That's right.

Q. Did either Miss Sheridan or Mr. Hickox say that they had been working on the lot off and on since July 6th?

A. I don't recall that statement.

(Testimony of Gordon E. Youngman.)

Q. Did she tell you of the many conferences and discussions that had been had by her with reference to a substitute for Mr. Young after he bowed out?

A. Mr. Hickox said that there had been a number of conferences.

Q. And did either Mr. Hickox or Miss Sheridan tell you that she approved John Lund?

A. No, I don't recall the name of John Lund being mentioned.

Q. Would you say that no mention was made of the fact that she had approved John Lund?

A. I certainly don't remember Mr. Lund's name being mentioned at any time during the conversation.

Q. How about Richard Conte? [489]

A. I don't remember that being mentioned.

Q. How about Franchot Tone?

A. Yes.

Q. And you do remember Boyer?

A. Yes.

Q. And you do remember that at that time Miss Sheridan said nothing about not wanting to do the picture, is that right?

A. That's right.

Q. In other words, she came to you, as you said when I examined you under Section 43 (b)—that they came to ask your help in getting the picture made, is that right?

A. Yes, sir.

Mr. Knupp: Mr. Gang, if you have some reference to his deposition I think in fairness to the witness he should be shown it.

(Testimony of Gordon E. Youngman.)

Mr. Gang: If there is any question in your mind about what you said I will be glad to let you correct it. I understood that is what you said.

The Witness: That's right.

Q. (By Mr. Gang): And the question from either Mr. Hickox or Miss Sheridan as to what the studio was going to do had to do with having the picture made, was it not?

A. I couldn't answer what was in his mind.

Q. What did he say at that time? [490]

A. He said, "What is the studio's position going to be?"

Q. And neither he or Miss Sheridan said that they wanted to be released from the commitment?

A. No. They said it looked like the picture wasn't going to start.

Q. Did they tell you why it looked that way?

A. Yes.

Q. On account of the fact there was no leading man to replace Robert Young as of that time?

A. That's right, the parties hadn't agreed as to a leading man.

Mr. Gang: That is all, Mr. Youngman.

Mr. Knupp: That is all, Mr. Youngman.

The Court: Step down.

Mr. Knupp: Mr. Schuessler.

FRED E. SCHUESSLER

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

The Clerk: Mr. Schuessler, you have also been sworn.

Direct Examination

By Mr. Knupp:

Q. Mr. Schuessler, I think you have testified that you were casting director at RKO? [491]

A. Yes, sir.

Q. And you had occupied that position for two years?

A. Yes, sir. Well, it hadn't been two years at that particular time. It was two years the first of the year. I was asked by Mr. Gang how long I had been with RKO. It was two years I had been there altogether. When the picture started I had been with RKO probably—When was this picture made, in '49?

Q. These negotiations took place in '49.

A. Then I was there only about seven or eight months. I came there January 1, 1949.

Q. And you had been engaged in the motion picture business in the capacity of a casting director or in some capacity connected with casting for how long prior to that time? A. Since 1922.

Q. In that capacity what, generally, were your functions, Mr. Schuessler?

A. To make suggestions and recommendations for the parts after the scripts were received by our department.

(Testimony of Fred E. Schuessler.)

Q. Did you have any other duties to perform in that connection?

A. After the actors were decided upon then the deals were set through our office in all cases except the stars.

Q. And what did you do in an endeavor to determine [492] whether particular actors were available?

A. If the actor was under contract to a studio, we checked with that respective studio; if he was a free lance actor, we checked with his agent if he had one; if not, we would contact the actor direct.

Q. Can you tell me now, Mr. Schuessler, whether Robert Ryan was available at RKO for casting in this part of Mark Lucas in "Carriage Entrance"?

A. I think he was at that time, yes, sir.

Q. He was under contract to the studio at that time?

A. He was, but I wasn't sure whether he had finished his previous picture. I think he had finished it.

The Court: He had?

The Witness: Yes, he had finished it, yes, sir.

Q. (By Mr. Knupp): Were you familiar with the work of Mr. Ryan in motion pictures?

A. Very definitely.

Q. And what was your opinion as to whether or not Mr. Ryan would have been proper casting for this part?

A. I thought he would have been very fine in the part.

(Testimony of Fred E. Schuessler.)

Q. Do you know whether Mel Ferrer was available for this part?

A. He definitely was available.

Q. Were you familiar with the work of Mr. Ferrer?

A. Yes, sir, from the stage as well as his previous [493] picture.

Q. In what stage plays had Mr. Ferrer appeared?

A. That I wouldn't recall offhand.

Q. He had appeared on the stage, though?

A. Very definitely, yes, successfully, in New York.

Q. When did he come to RKO, do you know, approximately?

A. I wouldn't know the date, no, sir.

Q. Do you know what picture he had made at RKO?

A. "Bed of Roses" was the title of it at that time. I think it has been released under another name.

Q. Also a picture entitled "Lost Boundaries"?

A. That was made before he came to RKO. We signed him after he made "Lost Boundaries," back East.

Q. In your opinion was Mr. Ferrer proper casting for the part of Mark Lucas in this picture?

A. I thought he would have been very good in it.

Q. Are you familiar with the work of Robert Preston?

A. Yes, sir.

Q. Do you know what experience Mr. Preston had had in motion pictures, I mean generally?

(Testimony of Fred E. Schuessler.)

A. Yes, he has been successful in pictures for a number of years.

Q. And were you familiar with the pictures in which he had appeared? A. Yes, sir. [494]

Q. Did you feel that Robert Preston would have been proper casting in this picture?

A. Adequate. Not as good as Ryan or Ferrer by any means.

Q. And is the same true with respect to Richard Basehart? A. Yes, sir.

The Court: Which? What do you mean "Is the same true"? Adequate or excellent?

Q. (By Mr. Knupp): Adequate, but not as good as Ferrer or Ryan, is that what your answer attempted to indicate?

A. Yes, sir. That is the question you asked.

Q. Yes. Did RKO at this time have a contract with either Preston or Basehart?

A. No, sir.

Q. Do you know where Preston was employed?

A. He was free-lancing.

Q. What about Basehart?

A. Basehart was under contract to Eagle-Lion.

Q. Did you ascertain whether either of these two men, either or both of them, would have been available for casting in this part?

A. Yes, sir.

Q. What was the situation with respect to Van Heflin, insofar as being available for casting in the part? [495]

A. I checked with the Metro casting office to as-

(Testimony of Fred E. Schuessler.)

certain his availability, and their reply was that if I called a week or so later than my previous call they would be able to tell me whether or not he would be available. In other words, I assumed from that that they probably had something in mind for him down there and they weren't certain they were going to use him themselves.

Q. So at that time it wasn't definitely ascertained whether Van Heflin would have been available? A. No, sir.

Q. With reference to the other four you did ascertain they were available?

A. Very definitely.

Q. What was the situation with respect to Robert Mitchum, relating your answer to the early part of August, 1949?

A. Would you repeat that question, please?

Q. What was the situation with respect to the availability of Robert Mitchum in the early part of August, 1949?

A. So far as our department was concerned, he was never given any consideration because he was in the midst of a picture called "Holiday Affair."

Q. So far as you knew did the studio have any plans for future use of Mr. Mitchum at that time?

A. Not to my knowledge. [496]

Q. In your judgment as a casting director, and from your experience, Mr. Schuessler, as a casting director, what in your opinion would have been the best available casting for the part of Mark Lucas in "Carriage Entrance"?

(Testimony of Fred E. Schuessler.)

A. In my opinion it was a toss-up between Ryan and Ferrer. The ability of both men, I would say, was on a par, but Ryan had some name value. Ferrer had just finished "Lost Boundaries," a picture which was in wide release at the time and was acclaimed by all the critics.

If the New York office wanted somebody with a new face, a fresh face, then I very definitely would have decided upon Ferrer. But Ryan was already established, and I am sure that he would have been the choice of the New York office because of that.

Q. Had Ryan appeared in any pictures up to that time with leading female stars in motion pictures?

A. He had just finished a lead with Joan Fontaine.

Q. What was Miss Fontaine's standing at that time as a leading star, leading lady, in motion pictures?

A. She is considered one of the big stars in the business.

Mr. Knupp: I think that is all.

Cross-Examination

By Mr. Gang:

Q. I won't hold you long, Mr. Schuessler. [497]

A. That is all right. I am enjoying this.

Q. You gave your expert opinion about the best available man for this role as being a toss-up between Robert Ryan and Mel Ferrer?

A. Yes, sir.

(Testimony of Fred E. Schuessler.)

Q. Did you convey that expert opinion to Mr. Hughes?

A. I don't know whether it was to Mr. Hughes or to Mr. Rogell. To one or the other.

Q. Were you consulted when he put Mitchum in the part? A. No, sir.

Q. Did you think that this was against your opinion, Mr. Schuessler?

A. No, definitely not.

Q. In other words, you thought Mitchum was even better than Robert Ryan, didn't you?

A. Because of his standing.

Q. First say did you think he was better?

A. Yes, definitely.

Q. If you want to explain you may go ahead and explain why you thought he was better.

A. I thought he was better box-office wise, that is the reason.

Q. However, you were not consulted?

A. No, sir.

Q. And the designation of Mr. Mitchum came not from [498] you but from Mr. Hughes, is that right, as far as you know?

A. So far as I know.

Q. You don't know directly?

A. No, sir.

Q. You read about it in the papers, too, I suppose?

A. I think that is the way I learned about it, yes.
Mr. Gang: Thank you, Mr. Schuessler.

The Court: When you said that Ryan and Ferrer were the best available, will you tell us what

(Testimony of Fred E. Schuessler.)

group you were referring to as available? They were the best out of whom?

The Witness: Out of perhaps——

The Court: Give us the names. You considered a certain number of people available. Your statement was that Ryan and Ferrer were the best available. Now, who did you consider as being available at that time?

The Witness: Of those names that I recall that are on this list, you have it as an exhibit, there was Franchot Tone, Richard Basehart, Robert Preston, I don't recall any of the other names, perhaps 12, 15 or 20 names on the list of players that were available.

The Court: All right. That's all. Step down.

Do you have something else?

Mr. Knupp: Are we taking our mid-morning recess?

The Court: Yes, we will take our morning recess at this time. [499]

Ladies and gentlemen of the jury, remember the admonition of the court not to discuss this case among yourselves or with anyone else, and you are not to form or express any opinion on the case until it is finally submitted to you for your decision. The jury may retire.

Court will recess.

(A recess was taken.)

The Court: The record will show that the jury are present and in their proper places.

Mr. Knupp: So stipulated.

Mr. Gang: Correct.

CARRIE KRIEGER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Carrie Krieger.

Direct Examination

By Mr. Knupp:

Q. Miss Krieger, or Mrs.? A. Miss.

Q. Miss Krieger, where are you employed?

A. At RKO in the wardrobe.

Q. What is your function at RKO in the Wardrobe Department? [500]

A. Well, I guess you would say sort of a cost clerk.

Q. Do you have charge of records in connection with the cost of making a wardrobe?

A. That's right.

Q. Did you occupy that position in July and August of 1949? A. Yes, I did.

Q. Do you have in your possession records that you kept in the regular course of business of the studio with respect to the wardrobe which was prepared for Miss Sheridan in "Carriage Entrance"?

A. Yes, sir.

Q. Have you those records with you?

A. Yes, sir.

Q. Will you produce them, please?

Mr. Gang: To save the court's time, if you have

(Testimony of Carrie Krieger.)

copies, Mr. Knupp, I will accept your statement that they are true and correct copies.

Mr. Knupp: I understand from your statement, then, that the statement that I have handed you may be offered as an exhibit in the case?

Mr. Gang: Yes, on the basis that this is a true and correct copy of what the books themselves would show with respect to these items.

Mr. Knupp: I will ask the witness about [501] that.

Q. (By Mr. Knupp): Miss Krieger, I have prepared a statement which I made from your records. You are not familiar with it. Will you just take a minute to compare the records which you have with you with the statement which has been prepared?

A. That is a true copy of what I have. I have the original.

Q. You made the original from——

A. From my records, from my cost cards.

Q. And that correctly sets forth the items of the costumes that were prepared for Miss Sheridan?

A. Yes.

Q. It also sets forth the cost of each item of that costume?

A. That's right.

Q. I notice that certain of these items are headed "Manufactured at studio"; what does that entry mean?

A. That means that they were made in our workroom, RKO workroom.

Q. What do the items of cost there represent?

(Testimony of Carrie Krieger.)

A. That represents material involved in making them, and also workroom labor.

Q. Do you keep a separate record of each outfit or each dress, or whatever it was?

A. Yes, sir. [502]

Q. Both with respect to material and workmanship?

A. That's right.

Q. And then the next item which you have listed is "Manufactured at Western Costume Co."?

A. Yes.

Q. The items under that heading represent what?

A. Those are costumes that they made at Western Costume and for which we were later billed.

Q. And the cost you have set forth there are the actual bills which were presented to Western Costume?

A. That's right.

Q. Now, I notice that you have an item "Cost of Altering Costumes listed below to fit Ava Gardner"; will you tell us what was done by the costume department in that respect?

A. As I remember about that, it was an attempt to salvage the wardrobe and use it for another actress, and costs were kept on that.

Q. That is to say, the original costumes that had been made for Miss Sheridan were, where possible altered so they would fit Miss Gardner who went into the role?

A. That's right.

Q. You have kept a complete record in your file of what the cost of altering those costumes was?

A. That's right. [503]

(Testimony of Carrie Krieger.)

Q. Those items that you have set forth there represent all of the costumes that it was possible to alter to fit Miss Gardner? A. Yes.

Q. And the cost of that alteration you have listed? A. Yes.

Q. The same is true under the item which you have listed as "Cost of altering costumes listed below to fit Janis Carter"? A. Yes, sir.

Q. Then, some of these costumes that had been made for Miss Sheridan were actually used in the production? A. Yes.

Q. And that is indicated on your statement under the heading, "Cost of costumes actually worn in production"? A. That's right.

Q. And you have given credit, then, on this statement, Miss Krieger, for everything that you could salvage from the costumes which were made for Miss Sheridan and which were actually used in the production? A. That's right.

Q. And you have indicated on the statement the total cost of the wardrobe which you were unable to use? A. Yes.

Q. I suppose you mean the wardrobe that was made for [504] Miss Sheridan? A. Yes.

Q. That was \$7,038.45? A. That's right.

Mr. Knupp: If the court please, we offer this recapitulation of the records of Miss Krieger in evidence as Defendant's next in order.

The Court: Exhibit D, Mr. Clerk?

The Clerk: Yes, your Honor.

(Testimony of Carrie Krieger.)

The Court: Received in evidence as Defendant's D.

(The document referred to was marked Defendant's Exhibit D, and was received in evidence.)

Mr. Knupp: I think that is all, Miss Krieger.

Cross-Examination

By Mr. Gang:

Q. The purpose of my questions is to get the facts more clearly in my mind and the minds of the jury. You are familiar with them, but we are not. Defendant's Exhibit D—Have you a copy of it, Miss Krieger? A. Yes.

Q. (Continuing.) —has eleven items of wardrobe listed under the heading "Manufactured at Studio," and three more, making a total of fourteen, listed as manufactured at Western Costume Co., is that correct? A. That's right. [505]

Q. And the total cost shown for all fourteen costumes is \$7,843.36, is that correct?

A. Yes.

Q. Under the heading, "Cost of altering costumes to fit Ava Gardner," you list, one, two, three, four, five, six, eight, nine, eleven, and twelve, which are ten items, is that correct? In other words, ten out of the fourteen actually were altered at a cost of \$1,279.36, to fit Miss Gardner? A. Yes.

Q. I assume the alterations were such that they were satisfactory for Miss Gardner, from your records?

(Testimony of Carrie Krieger.)

A. Whether they were satisfactory or not, they were cost.

Q. I mean the alterations were made so that they might be used in the picture——

A. If satisfactory, yes.

Q. Let me finish my question, please, so we will understand each other.

In other words, you altered those ten of the fourteen costumes for Miss Gardner for the purpose of making them available for use in the picture, is that correct?

A. Yes.

Q. The cost of the alteration was \$1,279.36?

A. Yes. [506]

Q. So if you had had the fourteen costumes in your wardrobe, and forget for whom they were made originally, and Miss Gardner came in to play the role, and you reached in and took those ten costumes out of the wardrobe and spent this money making them fit, \$1,279.36, as far as your records are concerned the cost to the picture of those costumes would have been \$1,279.36, is that right?

A. You mean to make them fit Miss Gardner?

Q. Yes. A. Yes.

Q. You would not have had to pay for manufacturing them, but just for altering them?

A. Well, yes, I suppose that would have been true.

Q. Two more of those fourteen were altered to fit Miss Janis Carter, items 6 and 11, and that cost \$293.82, is that right?

A. That is right.

(Testimony of Carrie Krieger.)

Q. The same thing would be true with reference to those two articles of clothing?

A. Yes, if they had worn them.

Q. So with reference to the 12 pieces which were altered for use in the picture, your total cost was \$1,573.18, is that right? A. That's right.

Q. Why did you make the list of cost of costumes [507] actually worn in production indicating that only four were actually worn in production?

A. Because according to the information I was given at the time those were the only ones that they finally approved to wear in the production.

Q. Who is they?

A. Well, the producer, director, whoever passed on them.

Q. This had nothing to do with the fact that the garments were suitable to be worn, this had to do with the fact that the scenes for which they were to be worn were cut out of the picture or not photographed, isn't that right?

A. That I don't know. I just put the cost down.

Q. As far as you are concerned, then, and from the records of your department, all of the clothes that were originally manufactured for Miss Sheridan, fourteen in all twelve of those fourteen were subsequently altered to be fit for use in the picture, is that right?

A. They attempted to use them.

Q. And as far as your records show they were fit to be used in the picture, isn't that right?

A. Yes, they were fit to Miss Gardner.

(Testimony of Carrie Krieger.)

Q. And the total cost of the alteration of those twelve items was \$1,573.18, is that right?

A. That's right. [508]

Q. If you look at your list you will see that you have a charge there for altering costume item No. 6 to fit Miss Gardner, and then you have a cost of altering it to fit Miss Janis Carter?

A. That's right.

Q. Is that the fact? A. Yes.

Q. In this case you have included the cost of changing it from Miss Gardner to Miss Carter?

A. Yes.

Q. Who told you to do that?

A. That was evidently another attempt to use that garment in the picture.

Q. As far as I can see, then, the only items listed under the cost of costumes made for Miss Sheridan on "Carriage Entrance," the only two that were made for her that were not actually fit for use in the picture were item 7, which was a negligee—purple net over petticoat, also corset and corset cover, which we have listed as costing \$864.24, is that correct, Miss Krieger? A. Yes.

Q. And item 13, street costume—skirt and blouse, costing \$475.00, and item 14, street outfit—dress, cape, and hat, costing \$525, and a jacket not completed, costing \$150.00, is that correct? [509]

A. Yes.

Q. So if we consider the items which were made for Miss Sheridan and not altered, we would only have those items I listed, 7, 13 and 14, and if we

(Testimony of Carrie Krieger.)

took the cost of altering the costumes to fit Miss Gardner, you would have the item of \$1279.36, is that correct?

A. What was that again, please?

Q. If you took the cost of altering the costumes listed below to fit Ava Gardner you would have \$1279.36, is that right?

A. I don't quite understand you.

Q. I am sorry. I will try to make it clear. Looking at your records, the cost to RKO of altering 10 items of clothing made for Miss Sheridan to fit Miss Gardner for "Carriage Entrance" cost \$1,279.36?

A. Yes.

Q. Is that right? A. Yes.

Q. Have you any way of knowing what it cost to alter costume No. 6 to fit Miss Janis Carter?

A. Do you mean broken down separately from 11?

Q. Yes.

A. I don't know. I think that went into one number. But of course this No. 6 that you refer to was actually worn in the production. [510]

Q. It was actually worn in the production?

A. Yes. So it was not considered—

Q. That doesn't concern me at this time, whether it was worn or not. What does concern me is that it was available for use in the picture, and as you have said of the fourteen items 11 or 12 at least were available for use in the picture, that is correct, is it not? A. Yes.

Q. You are unable to break down the item of

(Testimony of Carrie Krieger.)

cost of alteration of costume No. 6 to fit Miss Carter after altering it to fit Miss Gardner?

A. No, that went into one number.

Q. Isn't it a fact, Miss Krieger, that after the picture was made all of these articles went back into RKO's wardrobe?

A. Except the Western Costume.

Q. The items that Western Costume made went back to them? A. Went back to them.

Q. Did you get a credit or rebate?

A. No; those are on a production rental.

Q. That included items 12, 13 and 14. You called it rental. When did you rent them—before Miss Sheridan was fired or afterwards?

A. Western Costume was engaged to make them at the time [511] Miss Sheridan was going to be in the picture, and they keep track of their costs the same as we do, then in due course of time they present a bill for that amount.

Q. In other words, even though it wasn't rented you paid these items as rental?

A. We have to pay Western their cost of making things.

Q. And item 12, the gypsy costume, was actually used by Miss Gardner? A. That's right.

Q. The other items, 13 and 14, you paid rental for even though you didn't use them?

A. That's right.

The Court: Did you pay rental for them or pay the cost of making them?

The Witness: In a production rental Western

(Testimony of Carrie Krieger.)

Costume have to get the cost of making the garment.

The Court: Do you get title to the garment?

The Witness: No, it goes back to them.

The Court: You pay them for the full cost of making it?

The Witness: Practically.

The Court: But consider that is only rental?

The Witness: That's right, because it is made to order.

Q. (By Mr. Gang): Are you good at arithmetic, Miss Krieger?

A. Not without an adding machine. [512]

Q. We will have to do our own computation. Thank you very much.

Mr. Knupp: Just one question.

Redirect Examination

By Mr. Knupp:

Q. These items for which you have given credit on the bill, which represent the cost of altering these costumes, those items are deducted from the total cost of the costumes, that is correct, is it?

A. That's right.

Q. And those items represent the efforts which the studio made in order to make some of these costumes available for use in the picture as it was finally photographed?

A. That's right.

Q. And after these efforts had been made to alter the costumes, your statement indicates that only four of these costumes were actually available for use in the production

A. Yes, sir.

The Court: Just a minute.

(Testimony of Carrie Krieger.)

Mr. Gang: Just a moment. That is not the evidence.

The Court: Not "actually available," but "actually used."

Mr. Knupp: Yes.

The Witness: Actually used.

Q. (By Mr. Knupp: Do you know whether or not all of [513] these costumes that were manufactured at the studio or were manufactured at Western Costume Company were manufactured to Miss Sheridan's measurements?

A. Yes, sir.

Mr. Knupp: That is all of this witness.

Mr. Gang: No further questions.

The Court: It looks like a pretty good business to be in. "Negligee—purple net over petticoat, also corset and corset cover, \$864.24." I don't know what we are doing practicing law.

You may step down.

EDWARD DOWNES

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Edward Downes.

Direct Examination

By Mr. Knupp:

Q. Mr. Downes, you are in the accounting department at RKO?

A. I am working out of the accounting department at RKO, yes.

(Testimony of Edward Downes.)

Q. And you have kept the records of the amounts which were expended by RKO in the production, "Carriage Entrance"? [514]

A. No, I did not. That was kept by the picture cost department.

Q. I mean you have the records here which show that?

A. I have the records here which were compiled during the making of the picture, yes.

Q. Those records, of course, are kept in the regular course of business of the studio?

Mr. Gang: I will stipulate to those fundamental foundational questions, Mr. Knupp, and save the court's time.

Mr. Knupp: All right.

Q. (By Mr. Knupp): Can you determine from your record there, Mr. Downes, what amount was paid Mr. Travilla who was the designer of the gowns for Miss Sheridan?

Mr. Gang: May I ask a question, your Honor, in the interest of conserving time?

Mr. Knupp, is Mr. Travilla's salary in addition to the cost items which were set forth in the last exhibit?

Mr. Knupp: Yes.

Mr. Gang: And it relates to the designing of those particular fourteen costumes?

Mr. Knupp: Yes.

Mr. Gang: If the court please, if that is so——

Mr. Knupp: It relates to the services which he

(Testimony of Edward Downes.)

rendered in designing costumes especially for Miss Sheridan.

Mr. Gang: If the court please, I am going to object [515] only in the hope that if it is sustained it will save the time. In view of the fact that every item of the wardrobe was either available for use or remained the property of the defendant, whatever was paid Mr. Travilla for services rendered they got the benefit of the particular item and it, therefore, would not be relevant.

The Court: That is so largely a matter of argument rather than a matter of admissibility of the evidence. It goes to the weight.

Have you found out where this figure is? We got to arguing and you quit looking.

How about you telling us what this figure is and give Mr. Gang a chance to check it?

Mr. Knupp: I know it is \$3000.

Mr. Gang: If you say it is \$3000, I will agree to that, and if it is wrong you can look it up on your own time, and tell us about it.

The Witness: I can do that. Because all these accounts are by various numbers here, and without a check sheet it is rather difficult to find offhand.

Mr. Knupp: I suggest in that respect, if the court please, maybe we could shorten this considerably. I have prepared a detail of matters with respect to which I expected to interrogate the witness; with the aid and assistance of Mr. Gang, which he so kindly offers, we might save some time. [516]

Mr. Gang: Fine.

(Testimony of Edward Downes.)

I might state, just so nobody misconstrues my good nature, that I don't admit that any of this is relevant, important, or has any bearing on the case.

The Court: We understand your position.

Mr. Knupp: Yes, we don't expect you to admit anything, Mr. Gang. We are not asking that you should.

I have this detail in tabulated form, if the court please, the same information that the witness would glean by going through his books. I think if it could be stipulated that the examination of the witness would indicate the expenditure of these amounts from the books, I mean it would be determined the amounts had been actually expended by RKO in connection with the picture "Carriage Entrance," and during the period indicated by the detailed statement itself, we probably could excuse the witness and Mr. Gang and I could argue about the question of whether or not these are proper items of counterclaim.

Mr. Gang: I will certainly accept the figures and the items for which the figures were paid. Of course some of the editorial content I couldn't accept, but the figures and the amounts which were expended, and the date, I will certainly accept, and you can offer those items in evidence and I won't object.

Mr. Knupp: I don't know what particular literary work [517] or effort you have referred to, Mr. Gang.

Mr. Gang: You say "rewrite account of replac-

(Testimony of Edward Downes.)

ing Miss Sheridan." That is editorial. We can argue that a lot of that was for Mr. Mitchum. That is what I mean by editorial content. I don't object to the figures or the time.

The Court: Counsel have apparently agreed, so we will use the recapitulation chart, and before it is submitted to the jury if there is any editorial comment in it that one or the other of you don't like, you can strike it out. It will be Defendant's Exhibit E.

I think you should understand Mr. Gang's stipulation. This proof is offered by Mr. Knupp in support of the defendant's counter-claim against Miss Sheridan. You will recall that the studio has a counter-claim against her for a sum of money. Mr. Gang has merely stipulated that if we waded through this book we would find these figures which are on this recapitulation, and that therefore for the saving of time that the recapitulation be used rather than have the witness pull the figures out of a book. Mr. Gang, however, does not stipulate that these were necessary expenditures, nor does he stipulate that they are proper items of damage. That is a matter for you to decide. He has reserved his contention. You have heard it. I don't have to tell you about it.

Mr. Knupp: Yes, I believe the situation was clearly [518] placed before the jury.

Those are all the questions we have to ask this witness, if the court please, unless Mr. Gang has any.

(Testimony of Edward Downes.)

Mr. Gang: I stipulated myself out of cross-examination.

Mr. Knupp: I am not insisting on that, Mr. Gang. You can ask any questions you desire despite any stipulations you may have made.

Mr. Gang: Thank you. There is nothing to ask him.

Mr. Knupp: If the court please, I am not fortunate enough to be in the position Mr. Gang is; it always seems to me when someone mentions lunch it is 12:00 o'clock. But we have possibly one more witness that we can call immediately after lunch. I am not sure that that witness will be here, and if he isn't here, why, then, we will conclude with this witness. But we would like to take an adjournment until 2:00 o'clock.

Mr. Gang: Again, Mr. Knupp, I have a couple of minor rebuttal witnesses, like Mr. Banks. I would like to put him on so that he could go home and stay home, and we can use up this 15 minutes we have left.

Mr. Knupp: That is fine.

Mr. Gang: It is a little out of order.

The Court: All right. Mr. Knupp rests subject to his right to reopen, and you may proceed, Mr. Gang. [519]

Mr. Gang: Mr. Banks is called in rebuttal, and not under 43(b).

POLAN BANKS

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gang:

Q. You were in the court room when Mr. Sparks repeated, at my request, a statement he said was made by Mr. Hickox with reference to time being awasting; do you remember that? A. Yes.

Q. Do you remember any occasion on which such a subject was discussed when you were present?

A. Time being awasting as to the picture progressing?

Mr. Knupp: Could I hear that question, please, Mr. Reporter?

(The record was read by the reporter.)

Q. (By Mr. Gang): Yes. At which a discussion arose about \$10,000 a week.

A. To the best of my recollection I believe that took place as the four of us were leaving Mr. Sparks' office to walk up the lot. [520]

Q. And who were the four of you?

A. Miss Sheridan and myself were walking in front, and Mr. Hickox and Mr. Sparks in back.

Q. With reference to what particular conference can you relate this discussion? Was it at the end of July, the early part of August?

(Testimony of Polan Banks.)

A. It was quite late along in the hassle we were having about trying to find a leading man

Q. The question of time, as you now recall it, was somewhat pressing, was it? A. Yes.

Q. It would therefore place it somewhere along towards the August dates?

A. Probably in August, yes.

Q. And you say you and Miss Sheridan walked out in front? A. Yes.

Q. You had left Mr. Sparks' office?

A. Yes, we were leaving and walking up the lot, I believe, to Mr. Rogell. I am not sure about that.

Q. And Mr. Hickox was behind you with Mr. Sparks? A. Yes.

Q. And you were not in any office at the time?

A. No, we were walking on the lot.

Q. Were you fairly close together, if you remember? [521] A. A few feet ahead.

Q. You could overhear what was being said in back of you? A. I think so, yes.

Q. Can you relate that conversation as you remember it, Mr. Banks?

A. I only remember it very hazily.

Q. Repeat it as hazily as you remember it.

A. Well, I think to the best of my recollection that Mr. Hickox said something about time being awasting or pushing, or something like that, and I think he made a remark as to the fact that it would cost the studio \$10,000 a week if—rather, reminding Mr. Sparks that it would cost the studio \$10,000

(Testimony of Polan Banks)

a week with Miss Sheridan's extra weeks added to her fifteen weeks, and then to the best of my recollection Mr. Sparks made the remark rather kiddingly, "Well, Mr. Hughes could afford \$10,000 a week."

Q. In other words, Mr. Sparks made that remark?

A. Yes, Mr. Sparks definitely made that remark.

Mr. Gang: Thank you. Cross - examine, Mr. Knupp.

Mr. Knupp: No examination, if the court please.

Mr. Gang: Thank you.

May this witness be excused now, your Honor?

The Court: Yes, he may be excused.

Mr. Gang: Mr. Hickox, will you take the stand, please? [522]

ANDREW HICKOX

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

Mr. Knupp: I assume, Mr. Gang, this witness is called in rebuttal?

Mr. Gang: Yes, only in rebuttal.

The Clerk: Will you state your name, please?

The Witness: Andrew Hickox.

Direct Examination

By Mr. Gang:

Q. Where do you live, Mr. Hickox?

A. 131 North Rose Street, Burbank, California.

(Testimony of Andrew Hickox.)

Q. You have lived in California for a number of years? A. Yes, I have.

Q. You heard Mr. Banks' testimony just now?

A. Yes.

Q. Can you place the approximate date of the conversation when you and Mr. Sparks walked behind Mr. Banks and Miss Sheridan?

A. It was approximately August 11th.

Q. 1949? A. 1949.

Q. Can you repeat your recollection of that conversation, stating what was said by whom? [523]

A. Miss Sheridan and Mr. Banks were walking ahead——

Q. A little louder, please.

A. Miss Sheridan and Mr. Banks were walking ahead of Mr. Sparks and myself on the way to Mr. Rogell's office, we had just left Mr. Sparks' office, and on the way I said to Mr. Sparks, "Mr. Hughes better hurry up, otherwise,"——

Q. A little louder, please, Mr. Hickox. I cannot hear you. That is why I ask you to lift your voice.

A. On the way I said to Mr. Sparks, "Mr. Hughes better hurry up and make up his mind, otherwise it is going to start costing the studio about \$10,000 a week."

To that statement Mr. Sparks replied, "We won't worry about that, Howard has plenty of money."

Mr. Banks turned around to Mr. Sparks and said, "Rather an expensive playtime, isn't it, Bob?"

(Testimony of Andrew Hickox.)

Q. That was the end of that conversation?

A. Yes.

The Court: An expensive what time?

The Witness: Playtime.

Q. (By Mr. Gang): I direct your attention now, Mr. Hickox, to the afternoon of August 16, 1949. Did you go with Miss Sheridan and Mr. Banks to look at some film in the projection room at RKO?

A. Yes, I did.

Q. Did you at that time have a conversation with Mr. [524] Banks? A. After the film?

Q. Yes. A. A slight conversation.

Q. Did you ask him any question at that time with reference to whether or not the studio was going ahead to make the picture?

A. No, sir.

Q. Did you at that time have any conversation with Mr. Banks that you remember in which you asked whether the studio wanted to be released from its commitment with Miss Sheridan?

A. No, sir.

Q. You have no recollection of any such conversation? A. No, sir.

Mr. Gang: You may cross-examine.

Cross-Examination

By Mr. Knupp:

Q. You say, Mr. Hickox, that you had some slight conversation with Mr. Banks after you had seen the film on August 16th? A. Yes, sir.

Q. Do you recall what the conversation was?

(Testimony of Andrew Hickox.)

A. On our way from the projection room to Mr. Rogell's office I believe I said to Mr. Banks, "We are getting no [525] place." And that was about the extent of it.

Q. That is all you said? A. Yes, sir.

Q. And did Mr. Banks volunteer any reply to your statement that you were getting no place?

A. To my recollection he said, "It looks that way."

Q. Did you say anything to Mr. Banks on that occasion about it not appearing that the production would start? A. No, sir.

Q. Did you say anything to Mr. Banks on that occasion about whether or not the studio might be willing to pay Miss Sheridan \$50,000 and release her? A. No, sir.

Q. You didn't say anything of that kind?

A. No, sir.

Q. Since this litigation commenced, Mr. Hickox, have you had any conference with Mr. Banks with respect to this particular matter?

Mr. Gang: What particular matter are you referring to?

Mr. Knupp: I am talking about this particular conversation.

The Witness: No, sir.

Q. (By Mr. Knupp): You at no time discussed with Mr. Banks the question of whether or not this conversation which he has related actually [526] occurred? A. No, sir.

Mr. Knupp: That is all.

Mr. Gang: The witness may be excused as far as I am concerned.

That takes care of these two witnesses, I have one other on rebuttal, until the defendant rests.

The Court: We will take our recess.

Remember the admonition of the court, ladies and gentlemen of the jury. The case is not yet submitted to you. You are not to form or express any opinion on any of the matters pertaining to the merits of this case. You are not to discuss the case among yourselves or with anyone else until it is finally submitted to you for your decision. You may be excused. 2:00 o'clock. [527]

* * *

Los Angeles, California,
Friday, February 2, 1951— 2 P.M.

The Court: The record will show that the jury is present and in their proper places.

Mr. Knupp: Yes.

Mr. Sparks, please.

ROBERT SPARKS

recalled as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Mr. Knupp: If the court, please, I asked Mr. Sparks to return as there was some question raised with respect to the statement we filed here with respect to the time which we said was lost and the cost to the studio because this picture didn't start on August 22nd as we originally anticipated.

(Testimony of Robert Sparks.)

Direct Examination

By Mr. Knupp:

Q. Mr. Sparks, will you explain to the court what the situation was with respect to your time at the studio in connection with this picture?

A. Well, I had been assigned as producer of this picture, and while I am on a weekly salary at the studio, the time that I spend on a picture is apportioned to that picture, and at the time of the dismissal of Miss Sheridan [538] there was an accumulation of cost against this picture. It had not been determined whether the picture would be abandoned or whether it would be recast, and since I had been with the project since its inception, I was held on this to continue it in case they did revive the use of the script and material which had been prepared for the picture.

Q. Would it have been possible in your judgment as a producer for you to have been taken off the picture and then returned to the picture in the event that it was later recast?

A. I will have to answer that this way, Mr. Knupp: Apparently the studio thought that it would be to the interest of the picture that I be assigned and remain with it until it was determined what to do with it.

Q. You were not assigned to any other picture until this picture was finally completed?

A. No, sir.

Q. And during the time that you were recasting

(Testimony of Robert Sparks.)

the picture, and before finally starting rehearsals—they, I understand, started on September 26th—what were you doing?

A. In that interim period?

Q. Yes.

A. We were trying—there were many details about this production-wise which had to be organized and tied together, and there was a matter of script too that we were [539] trying to see what we would do in the event that there were different types of casting that might go into it. We still retained the project as an active project until it was determined what we should do with it, and that apparently was determined on the 26th of September, as I remember it.

Q. Was this work, at least some part of it, occasioned by the fact that Miss Gardner was substituted for Miss Sheridan?

A. That was involved in it. And later when Mr. Mitchum was assigned, that, too, occasioned some additional work on the script.

Q. With respect to the writer Marion Parsonnet, what was the situation with respect to Mr. Parsonnet?

A. Mr. Parsonnet, too, had been assigned to this as the writer, and Mr. Parsonnet was retained because he had done what he had done very capably, and it is very easy to lose a writer once he is assigned to a project if you should stop it, because he could take an engagement in another studio, and Mr. Parsonnet was retained on the

(Testimony of Robert Sparks.)

script during that period until that was determined.

Q. In other words, if Mr. Parsonnet, after Miss Sheridan's contract had been canceled, if he had been released then the question of whether he might become available for any revisions would have been in doubt? [540]

A. That was the important consideration.

Mr. Knupp: I think that is all.

Cross-Examination

By Mr. Gang:

Q. Mr. Sparks, on August 15, 1949, in what condition was the screen play?

A. We were ready to go with it on the basis of Miss Sheridan.

Q. And if you had been notified that a male actor had been appointed to play the role you could have started shooting when?

A. I think immediately.

Q. And had any time been allowed for the preparation of the man who would play that role, if and when he was assigned to it, or would he walk right on and start acting?

A. In the case—if I might be allowed to jump down to Miss Gardner going into the picture, there were, if I remember correctly, five or six days of shooting that the company could work before the actor playing the part of Mark Lucas had to be in the picture.

Q. Had you been notified of a definite starting

(Testimony of Robert Sparks.)

point of commencing principal photography in "Carriage Entrance"?

A. Had I been notified?

Q. Yes.

A. Well, no, we had no definite date, because we had no [541] definite agreement on Miss Sheridan's part to accept an actor.

Q. That is what I thought was the answer. On August 15th and August 16th, 1949, you had no definite starting date for the picture?

A. That is true.

Q. From August 22nd on, August 22nd would seem to be the Monday following Miss Sheridan's dismissal, as you put it, from that date on you continued actively on the project, you said?

A. Yes, we did.

Q. And you continued work with Mr. Banks and Mr. Parsonnet? A. We did.

Q. And what were you doing during that time from August 22nd to September 1st?

A. Well, I can't just tell you specifically.

Q. Well, give it to me generally.

A. Generally we were continuing our work on the preparation for production.

Q. And what was that work, Mr. Sparks?

A. Well, that had to do with script, that had to do with script polishing.

Q. Let's take that first, script polishing. What did you do in the interval of time between August 22nd and [542] September 1st polishing the script, do you remember?

(Testimony of Robert Sparks.)

A. Your question isn't clear to me, Mr. Gang.

Q. Let me rephrase it. You say you worked between August 22nd and September 1st on script, polishing the script. Is that what you said?

A. Yes.

Q. What did you do?

A. We edited our script.

Q. All right. Edited it with reference to what?

A. Well, my assignment on this was to prepare a script, and that included the editing of the script.

Q. What do you mean by editing? What did that consist of? Cutting out parts, shortening it?

A. That could be cutting out parts, it could be shortening it, it could be rephrasing it, it could be rearrangement of scenes.

Q. This you would have done whether or not Miss Sheridan played in it or not?

A. Perhaps. There was a lot of work to be done on the script at that time, so we were proceeding with it.

Q. So as to that, at least, Miss Sheridan's not being in the picture had nothing to do with the work you were doing?

A. Well, we had to prepare the script for a leading lady, Mr. Gang.

Q. But at that time you didn't know who the leading [543] lady would be, did you, Mr. Sparks?

A. I didn't know, no.

Q. You weren't polishing it for any particular leading lady, were you? A. No.

(Testimony of Robert Sparks.)

Q. You weren't polishing it for any particular leading man during that interval of time?

A. No.

Q. You weren't fixing the script up by anything Miss Sheridan did? A. Perhaps.

Q. Is that right? Not perhaps.

A. Supposing Miss Sheridan and the studio had reconsidered their position in this and come back into it and we had to start quick, that was a contingency.

Q. Part of the work you did was in the hope that Miss Sheridan and the studio would get together? A. Perhaps.

Q. Tell me definitely, you are the one that did it.

A. We had a leading lady, may I say that?

Q. You had a leading lady?

A. That we would have a leading lady.

Q. That would be true if Miss Sheridan would have been the leading lady? A. Yes. [544]

Q. The work you did during that interval had nothing to do with Miss Sheridan's being dismissed?

A. No.

Q. Would this be true of what Mr. Banks did and what Mr. Parsonnet did?

A. Yes, I guess it would have been.

Q. What you have just said would be true with reference to the time from August 22nd until September 1st would also be true from September 1st to September 9th when the news leaked out that Gardner and Mitchum were to play the part?

A. Yes.

Q. When did you first learn that Gardner and

(Testimony of Robert Sparks.)

Mitchum were to play the male and female leads?

A. I think it was sometime around the 10th, I believe, of September that Miss Gardner was going into the picture.

Q. Were you given any instructions about what to do with reference to the screen play?

A. No, that was left to my judgment. There were things to be done because this was a completely different kind of casting than we had with Miss Sheridan playing the part.

Q. You therefore went to work about the 10th or 11th of September, 1949, and revised the script not only for Miss Gardner, but Mr. Mitchum? [545]

A. No, Mr. Mitchum we didn't do those revisions until around the 26th of September.

Q. Between the 10th and the 26th you were just revising it on account of Miss Gardner?

A. That's right.

Q. That is all you did during that period of time? A. Yes.

Q. You are sure of that?

A. I am positive.

Q. When Mr. Mitchum got in you did work for Mr. Mitchum, is that right?

A. That's true.

Q. Are you able to segregate how much of your time or Mr. Banks' time, or Mr. Parsonnet's time was devoted to what you did in fixing the screen play from September 10th to October 3rd for Mr. Mitchum, can you break that up in your own mind?

A. Mr. Mitchum was from the 26th of September.

(Testimony of Robert Sparks.)

Q. All your time from that time on was devoted to fixing it for Mr. Mitchum? A. Yes.

Q. Your salary was then \$1150 per week, is that right, Mr. Sparks? A. That is true.

Q. Were you doing anything else during the time between [546] August 22nd and September 26th? A. No.

Q. What time would you get to the office?

A. 9:00 in the morning.

Q. And on each day would you meet with Mr. Banks and Mr. Parsonnet?

A. Probably we did. I can't recall. I can't recall, Mr. Gang. That has been 18 months ago. I don't remember. I can't break it down.

Q. You did nothing else. You didn't read any proposed story for future work on your part?

A. I don't recall that I did, no.

Q. Is it possible that you did?

A. It is possible, yes.

Q. It is your custom, is it not, when working on one picture to be reading other scripts and stories with reference to your future work?

A. That is true.

Q. And there was no reason for you to alter your custom during this period of time?

A. That is true.

Q. There was some doubt in your mind during this time as to whether the project would be abandoned or go ahead? A. That's true.

Q. Does that refresh your recollection that you were [547] looking for other work to do in case

(Testimony of Robert Sparks.)

it was abandoned?

A. We had other assignments there, Mr. Gang, that perhaps could be made available to me when I had the time to take them on.

Q. During that time did you do anything in looking them over to see what you should be doing?

A. I have a very good knowledge of what stories are at RKO.

Q. And your present testimony is to the best of your recollection that every morning from 9:00 to 9:30, when you got in, until 5:30 at night you were working on "Carriage Entrance."

A. Yes.

Mr. Gang: Thank you.

Redirect Examination

By Mr. Knupp:

Q. Mr. Sparks, I understand that this production as far as you were concerned, assuming Miss Sheridan was to appear in the starring role, was ready to start on August 22nd?

A. We were ready with our script to begin around that time, yes.

Q. So that the work that you did subsequent to August 22nd, if you had to do additional work in connection with that script, would have been done during the period when the [548] picture was being photographed?

A. Well, the work from that period on, Mr. Knupp, concerned the fact that Miss Gardner came into the picture.

(Testimony of Robert Sparks.)

Q. But assuming now that there had been no change and Miss Sheridan had performed the leading role, any additional work that you had to do on the script would have been done during the time of photography?

A. It could have been, yes, in case Miss Sheridan had not approved the script or wanted something changed.

Q. So whatever additional time you had to put in on the production after August 22nd would have been necessary even if Miss Sheridan—I mean to say you would have done that work even if Miss Sheridan had appeared in the picture?

A. If I thought it was necessary, yes.

Mr. Knupp: That's all.

The Court: By the way—again, counsel may object to this question.

Mr. Knupp: I don't object to any questions the court asks.

The Court: You haven't heard the question.

Mr. Knupp: At least not until I hear them.

The Court: After it was decided within the studio to put Mr. Mitchum in this picture, did you or anybody else in an executive capacity at the studio go back to Miss Sheridan and say, "Now Mr. Mitchum is available, all will be forgiven, [549] come on back and we will make the picture"?

The Witness: No, sir.

The Court: All right. That is all.

A Juror: What was that answer, your Honor?

The Witness: No, sir.

Mr. Knupp: Mr. Stevenson.

ROBERT STEVENSON

recalled as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Knupp:

Q. You were assigned as director in this picture, Mr. Stevenson? A. Yes, sir.

Q. You worked on it until the picture was completed? A. Yes.

Q. And it was contemplated that the production would start about August 22nd?

A. I don't remember the date.

Q. Well, whatever the date was, from the date that the picture was started until it was completed did you devote your entire time to the production?

A. Yes. [550]

Q. What did you do in that connection? There was a period from August 22nd, when you originally expected to start, to September 26th when the tests for photography started, what were you doing during that interval?

A. Part of that time I worked on the script with Mr. Parsonnet and Mr. Sparks. The rest of the time was given over to my own preparations for directing the picture.

Q. In the event that the picture had started on August 22nd with Miss Sheridan in the role, would the work that you did, to which you have just re-

(Testimony of Robert Stevenson.)

ferred, would that have been done by you during that period? What I mean to say is, is the work that you did work that you would have done during actual photography if the photography had started August 22nd?

A. I don't quite follow you.

Q. You testified you did certain work with Parsonnet, and you said you did certain work in connection with the preparation of the picture. Assuming that the picture started August 22nd, when would you have performed that work?

A. Part of the work on the script was in connection with the change to Ava Gardner, part of it was not, and that, if we got those ideas, would have been done during the making of the picture.

Q. What about your additional preparation for direction? [551]

A. I either wouldn't have had time to do it or would have done it during the shooting of the picture.

Q. You merely feel that the result would have been that you would have been less well prepared to direct it? A. Yes, sir.

Mr. Knupp: I think that is all.

Mr. Gang: No questions, Mr. Stevenson.

The Court: The record will show that the witnesses just called, Mr. Sparks and Mr. Stevenson, are called as part of the defendant's case in chief.

Mr. Knupp: That is right, if the court please.

The Court: In connection with Exhibit E, which was admitted this morning.

Mr. Knupp: That is our case now, your Honor.

Mr. Gang: Will the court indicate for the record that a motion is made to strike the counter-claim, and for a directed verdict on behalf of the plaintiff on the complaint. We will argue it after I put my rebuttal on so we won't have the jury running in and out.

The Court: That is permissible. Is it all right with you, Mr. Knupp?

Mr. Knupp: That is all right.

Mr. Gang: Miss Sheridan, take the stand. [552]

ANN SHERIDAN

recalled as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gang:

Q. This is what we call rebuttal, Miss Sheridan, which is merely to get your version of one conversation which was testified to as part of the defendant's case. That is with reference to the conversation which was fixed at about the 11th of August, 1949, in which the subject-matter of delay was discussed. Do you remember walking across the lot at RKO with Mr. Banks and Mr. Hickox and Mr. Sparks?

A. Yes, I do.

Q. Is that clear in your mind?

A. Yes, sir.

(Testimony of Ann Sheridan.)

Q. Can you give us your account of what happened on that occasion?

A. We were in the quadrangle, actually, of the RKO lot, crossing to Mr. Rogell's office, Mr. Sparks—I beg your pardon, Mr. Banks and I were walking ahead, Mr. Sparks and Mr. Hickox following, and there was sort of a burst of laughter, I would call it, we heard noise, anyway, and both Mr. Banks and I turned and asked the reason for the sudden merriement, and Mr. Hickox said that he had just said to Mr. [553] Sparks that Mr. Hughes had better hurry and make up his mind, otherwise it would pretty soon start costing him about \$10,000 a week, to which Mr. Sparks had replied that we wouldn't worry about that, Howard had plenty of money.

Mr. Banks said something to the effect that that was a pretty expensive pastime, and we continued to Mr. Rogell's office.

Mr. Gang: Thank you.

The Court: So that there will be no misunderstanding, this talk about \$10,000 a week extra, refers to additional time under the contract if the picture was not completed within a certain fixed time set forth in the contract.

Mr. Gang: That is correct. That would refer to time beyond 15 weeks from July 6th, 1949.

The Court: All right.

Cross-Examination

By Mr. Knupp:

Q. Miss Sheridan, you have heretofore testified

in this case and have testified, as I understand it, covering all of the conversations that you had at the studio with Mr. Sparks? A. Yes, sir.

Q. At no time during that testimony, as I recall, did you relate this conversation which you have now related? A. No, sir. [554]

Q. Has your memory been refreshed with respect to that matter? A. To what matter, sir?

Q. This conversation to which you have just testified. A. Yes, sir.

Q. And how was your memory refreshed?

A. When you brought it up.

Q. Did you talk to Mr. Hickox about it?

A. Since he has been in court, yes.

Mr. Knupp: That is all.

Mr. Gang: That is the conclusion of the case, your Honor.

You may step down, Miss Sheridan.

Mr. Knupp: We have nothing else, if the court please.

The Court: Both sides rest, is that correct?

Mr. Gang: Yes.

The Court: I think we had better excuse the jury until Tuesday morning, don't you think so? Let me look just a minute here.

There is a possibility that we might have time for the arguments Monday afternoon, if you limited yourselves to an hour apiece, and instructions Tuesday morning. That would mean, however, that the jury would be coming in only a half day on Monday. Or we can ask them to come in at 9:30 Tuesday

morning, have the arguments and instructions, and they [555] can get the case either before noon or right after noon Tuesday. What is your preference?

Mr. Knupp: Either one is satisfactory with us, if the court please. Tuesday morning would suit me. If the jury is going to come back, they might as well come back in the morning and then they can finish the matter that day, without the possibility of them coming back Monday afternoon and then coming back Tuesday.

Mr. Gang: That makes good sense to me, if the jury doesn't mind.

The Court: I think we will have you come in Tuesday morning. We have on Monday a calendar day, motions in this court, also our monthly setting calendar, we have some 60 cases ready to be set, and that takes a long time just to call the cases. I couldn't get to you until the afternoon, and there is always the question, then, of whether we can get to you. You had better come in Tuesday morning. We will make it at 9:30.

The jury will be excused at this time until 9:30 Tuesday morning. Remember the admonition of the court. The case has not yet been submitted to you. You still have to hear the argument of counsel—I should say you are still privileged to hear the argument of counsel and the instructions of the court, and it is at that time that you should get started on making up your minds. So until then [556] you will refrain from discussing the case among yourselves or with anyone else, and you will not form or express any opinion on the merits of this case

until it is finally submitted to you. You are excused until 9:30 Tuesday morning.

(The following proceedings were had in the absence of the jury:)

The Court: The record will show that the jury is now absent.

Mr. Gang: I first would like to present the motion which is either for a non-suit on the counter-claim, or perhaps for a directed verdict for the plaintiff on the defendant's counter-claim.

I present that motion, your Honor, on the following grounds:

On any theory of the case, your Honor, looking at paragraph 29, it is conceded that the defendant as the employer, had the ultimate right to make a final order assigning or selecting a man to play the leading male role. Mr. Knupp so stated in his opening argument, and that has at all times been conceded to be so. The contract merely gave Miss Sheridan the right, once a final selection had been made by defendant, to approve or disapprove. If she disapproved——

The Court: Where do you find that spelled out in the contract in so many words? I don't find it written that way. [557]

In paragraph 1 the only language there is:

“Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

“(c) The actor who will portray the leading male role in ‘Carriage Entrance.’ ”

Until she has approved the actor——

Mr. Gang: There isn't any question that she had approved, and from July 6th to July 8th, 9th, 10th, 11th and 12th, there was an approval of an actor in effect and she was rendering services.

This is uncontradicted in the record, your Honor. What happened was after she had commenced rendering services.

As far as defendant is concerned, you cannot construe this any other way than it is written here. She had started to render services, she had been obligated ever since April 29th when she had approved. That approval stayed in effect until after July 6th when the term began and continued in effect until Mr. Young bowed out. So the defendant had required plaintiff to and plaintiff had actually rendered services when the situation arose with reference to Mr. Young's refusal to play the part. That is very plain. [558]

Point 2, the contract and the clause in question is the clause only for the benefit of the defendant here. You therefore have to read it in that light.

The Court: Now you are talking about 29?

Mr. Gang: I am only talking about paragraph 29. That is the clause which is concerned with this motion which I am now arguing.

The point I just made was that the second sentence of paragraph 29 related to a situation if the artist does not approve any of the items and does not render services.

I just pointed out that was no longer applicable, because on July 6th and thereafter the artist had approved, the defendant had accepted that approval, and services had been rendered.

On that set of facts, and that is the uncontradicted evidence because this is the defendant's evidence too, there isn't any conflict on that, your Honor—in view of that, and I am directing myself at this time only to the question of the counter-claim, in view of that evidence and the uncontradicted evidence, there is no room here for any counter-claim by the defendant, in view of the fact that what occurred thereafter does not come within the purview of paragraph 29 as written by the defendant.

The next point. Assuming that your Honor construes it so that it doesn't mean what I think it means, I will [559] direct myself to that possibility. May I say that I hope your Honor realizes that I believe that in all your rulings, even though against me, you have done it the way you see it, and I have no quarrel with that. That is, no personal quarrel, whatever the legal quarrel may be. I do say at this time, now that all the evidence is in, and I am again speaking only of the counter-claim, on any theory whatever, if paragraph 29 or either sentence thereof is operative, on defendant's own theory, insofar as the counter-claim is concerned, it can only be based on evidence to the effect that the plaintiff who had the right to approve or disapprove, or the privilege, whichever word you want to use, that the mere exercise of the privilege or

right of disapproval, assuming it was exercised, the point I make is that on the main case our position, of course, is that she never was given the right by any final choice of selection by the defendant to exercise that right of approval or disapproval, whatever discussion might have taken place before, but assuming for this argument only that the defendant did what it never did, which is, said, "Well, we have listened to you, we can't get together, we are therefore assigning Mr. Robert Ryan to the role, and the picture starts with Ryan, and if you don't approve him, as you have a right not to approve him, you are fired, or we terminate the contract," that would have been a termination of the contract by right. [560]

Assuming that they had done that, I think it is the defendant's position, I think he has made it clear, that RKO could have spent \$1,000,000 up to that point and they would have no recourse against plaintiff, because she had the right, exercised in good faith, to disapprove anybody. I say "exercised in good faith," because there is a great deal of difference between reasonable and unreasonable. The evidence here conclusively shows, and I speak of the evidence of the defendant's, particularly of Mr. Rogell, who said that the first film Miss Sheridan saw of Robert Ryan was unfortunate because it showed him as a broken-down prize fighter with cauliflower ears, and they were never able to overcome that first impression put in Miss Sheridan's mind. There wasn't a single witness put on by the defendant that said Miss Sheridan had been arbi-

trary or capricious in the position she took as to any of the names that had been mentioned in the discussions.

I say nothing about our witnesses; I speak only of the defendant's witnesses.

On this particular point, your Honor, it would merely serve to confuse the jury if any issue were submitted to them on the counter-claim because there isn't one piece of evidence from which an inference might be drawn that the plaintiff acted otherwise than in the best of good faith.

The meetings of August 15th and 16th, before she was [561] fired, showed that at that time she was still trying to get them to assign somebody who would meet with her approval.

So I say again, your Honor, on the defendant's evidence alone defendant has not only not shown lack of good faith, it has affirmatively shown good faith on the part of Miss Sheridan, and even reasonableness, which is far and beyond what is necessary.

Third and last, even if you assume that there is enough evidence from which an unreasonable jury might infer lack of good faith, there isn't any evidence on the issue which is material.

You heard Mr. Sparks. There is absolutely no differentiation before this court as to how much of the money that was spent after August 22nd was really spent because Miss Sheridan quit, and how much they spent because they had to fix the thing up for Mr. Mitchum and Miss Gardner. No differentiation at all.

In that connection, I think the damage point itself is erroneously taken by the defendant. Assuming that there was a breach of contract by Miss Sheridan, damages were fixed at the time of the breach, if there was a breach, which could have only taken place on August 16th. The burden is on them to mitigate damages, not to run them up by going on from then on.

At that time, if she had breached the contract, whatever [562] the damages were at that time it would necessarily have been up to the defendant to show what the damages were as of August 16, 1949, which would have meant what money they spent up to that time, which they could not recoup, and which they did not subsequently recoup in making the picture.

I submit on the issue of damages alone the defendant has misconceived the time when the damages were incurred, and the evidence submitted on the damage point is certainly not in any sense sufficient to go to the jury.

I respectfully submit that the motion of the plaintiff should be granted.

The Court: I want to hear from Mr. Knupp on part of this.

On the question of damages, damages can accrue after breach; they don't have to accrue right at breach.

I think it is true there is a lot of uncertainty as to how much of this alleged damage might have been caused by the wrongful act of Miss Sheridan,

if there was such a wrongful act. However, that is sort of a question for the jury.

I am a little intrigued by this contention that there isn't any evidence from which a jury could find that Miss Sheridan had been guilty of bad faith.

As I have to end this matter, if the jury should go out and find Miss Sheridan had been guilty of bad faith, and this court thought that the jury was plainly wrong, or to put it [563] another way, this court thought there was not evidence upon which that verdict was based, the court would have a right to set that verdict aside.

I would like to have you spell out for me how you would say that there is any evidence of bad faith, or whatever other ground there might be, to predicate a wrongful act on the part of Miss Sheridan.

Mr. Knupp: The situation, as I see it, if the court please, is this: We conceded, of course, that Miss Sheridan up to the time that this contract was terminated had the right at all times to approve or disapprove anybody that we proposed for this role, and I also concede that Miss Sheridan had the right to use her honest judgment in that respect. I could only hope in this case, if the court please, to persuade the jury that there was evidence of bad faith if it appeared to the jury—and, of course, the court is sitting as a thirteenth juror—that these people who had been presented, proposed by the studio for this role, were capable, were available, and were adequate casting for the part, and that despite that

fact Miss Sheridan not only refused to approve any of those proposed actors, but she insisted on her part that they should appoint Mr. Franchot Tone, whom the studio had expressly said they would not appoint to the role.

I think the question of just where Miss Sheridan was [564] exercising her legal right to approve or disapprove—and as I say, if she disapproved and the jury thought she disapproved in good faith, we have no cause of action on the counter-claim, as our only basis for the counter-claim would be that we had proposed to her repeatedly men who were available for this part and were adequate for the part, and that she without sufficient consideration of the merits of those actors had not only refused to approve one of those men, so that the production might proceed, but she had insisted on a right which she didn't have, to name somebody herself for the leading male role, and I think——

The Court: Let's see there. As far as Miss Sheridan's conduct is concerned, there are a number of things she didn't do. She didn't get off and sulk, she didn't say "Well, I am not going to take that man, you won't take my man, so I won't talk to you." She apparently came down every time you asked her to come down, she looked at pictures every time you asked her to look at pictures, even up to the eleventh hour when apparently you were getting ready to pull the plug on her; she was in talking to Youngman, trying to find out if there wasn't some way to get this thing going. I don't see how a jury could—of course, my experience

with women is limited—but I can't see but what that is fairly reasonable conduct on the part of a woman, judging by some of my experiences. [565]

As I say, she didn't set her feet, she didn't sulk; she conferred, she was present, she looked at pictures.

You say she kept insisting on Tone. I heard a witness make that statement from the stand, but as I see this picture, she said Tone would be satisfactory, and she named several other people who would be satisfactory, and she was the one who was continually bringing in new names, and in that sense she was the one that was trying to save the negotiations.

While the evidence is fairly clear that the executives of RKO were kind of under instructions to sell her Ryan or Ferrer.

Mr. Knupp: It is perfectly proper if they were, if the court please, because in their judgment they were spending a lot of money on this picture, they had these men under commitment.

The Court: I can understand that, but she had told them why they weren't acceptable. So instead of showing the open-mindedness which she did in proposing other people, they talk a little while and then they come back again to Ryan and Ferrer. Well, she said, "I don't want Ryan and Ferrer." It is like playing a record over and over again. So clear to the end you get the impression that as far as the studio is concerned they were going to sell her Ryan or Ferrer.

Can you say that she exercised bad faith when

she had once said "I don't want them, they don't fit, I don't think [566] they will do"?"

The mere fact that she stuck to her position and didn't change, you might say that is stubbornness. She, however, conferred about it, she saw other runs of pictures with the men.

Mr. Knupp: The court says the studio was bound to sell her Ferrer or Ryan. They did make an effort to do that, but beyond that they went out and got men that they thought would be adequate for the casting, that were not under commitment, They offered her those. They offered her Preston and Basehart, and she had no interest in those men. She wouldn't express any interest in them. I don't know. Maybe the jury will feel exactly as you do, I don't know. I say that is a question of fact as to whether or not what she did constituted the exercise of bad faith on her part.

The Court: What do you say is her bad faith now?

Mr. Knupp: I say that her bad faith, if any existed in this case, must be found in her continued refusal to accept adequate actors for the part, and her insistence upon the appointment of a man that she knew the studio couldn't consider.

The last time she met with Mr. Rogell, as he said, the only thing she suggested was Doc Tone, she insisted on Doc Tone.

He asked her expressly again whether or not after she had [567] seen these pictures she wouldn't consider Ryan or Ferrer, or Basehart or Preston, and she said no, she would not.

I admit, if the court please, on this question of bad faith on the part of Miss Sheridan the line is very fine, because she had an absolute contract right here. She never had to perform at all. If they would have appointed Clark Gable to this picture, Miss Sheridan could have said "No, I don't want to perform with Clark Gable." Then the question of whether there was some motive behind that, except her merely exercising her contractual right, might still have raised the question of whether she was exercising good faith.

The mere fact that she didn't have a chance to approve a man like Clark Gable isn't decisive of the question of whether she was proceeding in good faith.

Then the court is entitled to take into consideration here the testimony which is in the case, that not only in the conversation with Banks, but also in the conversation with Youngman, it was indicated by Miss Sheridan, or her representative, that they thought the picture was not going to start, and they wanted to know what kind of settlement they could make with the studio.

That is our position, if the court please; that is, what there is to it, and we never get away from the proposition that this right with respect to approval was an absolute [568] contract right.

The Court: That's right. That is why it looks to me that it becomes more important to spell something out that could be called bad faith.

Mr. Knupp: I think on that issue it is just a question of what the court feels about the situation.

Myself, I feel that there is sufficient evidence here from the facts which I have referred to which would justify a jury, if they viewed the evidence that way, in concluding that Miss Sheridan didn't at any time intend to perform and didn't intend to accept any of these people that were proposed, and that her actions and her statements were all predicated upon an attempt to put the studio in a position where it knew it couldn't propose anybody that she would approve.

The Court: It is not so much arguing the weight of the evidence. That doesn't help us any. There are answers on the weight of the evidence to some of the things that you mentioned. I am more concerned in what particular things——

Mr. Knupp: I have told you everything that I think there is in the evidence that would sustain our position. I do think it is a question of fact for the reasons that I have indicated.

The Court: This motion has more implications than appear on the face of it. Is that right? Because if this [569] motion should be granted, granting a motion for a directed verdict on the counter-claim on the ground that there is not sufficient evidence of bad faith on the part of Miss Sheridan, then by the same token a similar motion would lie as to your contention that she is entitled to no compensation at all.

Mr. Knupp: I don't think that follows, if the court please. Because if she had exercised good faith, I still think under this contract she might have refused to approve and still the question would arise as to whether she was entitled, strictly

from a construction of the contract, to any compensation. If we assume that the studio was acting in good faith in the proposals of these different people to portray this part, and that Miss Sheridan was acting in good faith in refusing, we still have the contract provision which gave her the right to refuse to approve, and which provided that if she didn't approve she was not entitled to any compensation.

I think there are three possible situations which this case presents:

One in which Miss Sheridan is entitled to recover because of the facts; one in which neither party is entitled to recover because of the facts; and, third, one in which the studio is entitled to recover because of the facts.

I think all of those are issues of fact for the jury to determine. [570]

But so far as the question of whether or not the decision on this motion would affect a decision on whether Miss Sheridan is entitled to any compensation at all, I don't think it does.

My own view is assuming that both parties acted in good faith, still under the contract if there was no approval Miss Sheridan was not entitled to compensation. The defendant had the right to terminate the contract as and when it did.

The Court: I think maybe we are talking about the same thing, but your defense to her suit is two-fold: One is that you defend on the ground that she was guilty of bad faith; you defend on the

ground that if both parties were in good faith, she is still not entitled to recover.

Mr. Knupp: Yes.

The Court: What I am trying to say is, if I grant this motion doesn't it kick one of the legs out of your defense stool?

Mr. Knupp: I think it only affects the situation with respect to our counter-claim, if the court please. If you grant this motion, it certainly does a lot of injury to our counter-claim.

The Court: This is the kind of motion that I also have a right to take under submission and reserve ruling on and rule after the jury has ruled on it, is it not, under the [571] rules?

Mr. Gang: The purpose of the motion was not to confuse the jury. I was about to make a motion which would fit in with what you just said, which was for a directed verdict for the plaintiff on the second leg of the defense, in which case your Honor would have the right to reserve that, because that would be necessary to lay a foundation for a judgment notwithstanding the verdict in the event, remote, I hope, that the jury did not bring in a verdict favorable to the plaintiff.

The Court: On this motion I have a right to reserve ruling and pass on it after the jury ruled, do I not?

Mr. Gang: I cannot say. I am not expert enough in procedure.

Mr. Knupp: The rule, of course, refers to a motion by the parties, either defendant or plaintiff, and gives the court the right to reserve its decision.

It doesn't say specifically on counter-claims or complaints, or the affirmative defenses. I assume the court is correct in its statement that it has a right to reserve its rulings on motions made by anybody at the end of the adversary's evidence. It is rule 49(a) and (b).

The Clerk: Rule 50, I think.

The Court: The clerk says Rule 50.

Mr. Knupp: I have great regard for the clerk, but I [572] think this is Rule 49(a), your Honor will find.

Mr. Gang: I am out of this argument. I don't know the numbers.

Mr. Knupp: Maybe the clerk is right and I am wrong. I am talking about verdicts.

(Short delay in proceedings.)

The Court: Your first motion is a motion for a directed verdict on the defendant's counter-claim?

Mr. Gang: Yes, your Honor.

The Court: Now, what is your second motion?

Mr. Gang: The second motion is for a directed verdict on the plaintiff's complaint.

In making this motion, your Honor, we are of course reserving plaintiff's objections which were made to the court's pre-trial order, and particularly that portion thereof in which the amount of our recovery was limited if we recovered to \$50,000 instead of \$150,000 and 10 per cent of the profits. In other words, I don't want the motion for a directed verdict to waive our objection to that phase of it.

The motion is based on the following grounds:

That the uncontradicted evidence shows that plaintiff commenced the rendition of her services on the contract and actually did become obligated to perform under the contract;

Second, that the defendant made no final order either in writing or orally requesting plaintiff to exercise her privilege of approval or disapproval with reference to any [573] particular actor named for the leading male role;

Third, that RKO, the defendant, never assigned any actor as a final selection by defendant with a statement to plaintiff indicating to plaintiff that plaintiff could either approve or disapprove, and in the event of disapproval that plaintiff would not longer be employed;

Fourth, that the evidence with reference to discussions between plaintiff and defendant is evidence only of an effort to arrive at a meeting of the minds so that defendant in submitting an actor would know in advance what plaintiff's opinion would be if submitted.

Finally, as I have said before, there is absolutely no evidence in this case, either that plaintiff acted in bad faith or that plaintiff acted other than reasonably and in accordance with the terms of the contract insofar as they related to the obligations of the plaintiff.

The Court: We are right back on paragraph 29 again, aren't we?

Mr. Knupp: Yes, if the court please, except for this one matter that Mr. Gang has argued with respect to approval or disapproval. I don't think

conditional limitation, namely, that he didn't have to perform, and everybody knew that he didn't have to perform.

The Court: But the point is that the second sentence of 29 talks about the actress' approval. It says: However if, because the artist does not approve any one or more of the items specified in paragraph 1, artist does not become obligated to render services.

Sheridan was obligated as far as Young was concerned, as far as her part was concerned, she had obligated herself by Exhibit 2, the letter of approval.

It is true there was a possibility of an avoidance of this contract by Young coming along and saying "Well, I won't work." But it wouldn't have changed her obligation. Once Young had said "Well, I will take it," she was tied up in her approval.

Mr. Knupp: And once Young said that to RKO, RKO was tied up. But until he said that, neither of them were.

The Court: She was obligated.

Mr. Knupp: If Young didn't approve, she was in the same position. She said to RKO, "If Young doesn't approve, you can appoint somebody else, but if you do it must be somebody I approve."

There is no question but what the contract contemplates the approval of someone who is going to perform the role; [577] not someone who might have been approved conditionally.

The Court: Supposing RKO had not thought about RKO's clause, they hadn't thought about it

and they suggested Robert Young, and Miss Sheridan came along and approved Robert Young, and they started to make the picture, would there be any question but what she was obligated?

Mr. Knupp: None at all, if the court please; there would be no question in my mind if Miss Sheridan hadn't reserved this right of approval, that there would have been a contract, an immediate contract under which RKO was obligated and so was she. But because of the fact that both of them contemplated these conditions which might arise, they never did reach a point where they had an agreement as to who the leading man was to be.

I think the contract very plainly contemplates until that essential feature of the contract had been reached by an agreement between the parties, that nobody was bound to perform.

That is the only way I can interpret the contract.

As I say, if Miss Sheridan had come in here and said "I approve Robert Young," and the studio had undertaken to secure the services of Robert Young, without any limitation, or if Miss Sheridan had not reserved her right of approval as to the leading male actor, when she signed this contract, if she signed a straight contract and said "You can appoint [578] whoever you think is best in this picture," then both parties would have been bound.

But that isn't what they contemplated.

The Court: Again, that isn't what the contract says. None of us drew this contract so we can talk about it. It says in paragraph 1:

"Artist shall not, however, be required to

render any services pursuant hereto unless and until she has approved * * * the Actor who will portray the leading male role.”

It doesn't say that the studio had to approve him. It didn't say that the studio had even to suggest it.

We infer some of those things.

But the point is the particular provision there was that she was given the right to say “I approve,” and once she said “I approve” she was bound.

Mr. Knupp: Certainly if she said that unconditionally she would have been bound, and so would have been the studio. If the studio had proposed to her unconditionally, “We propose to put Robert Young in this picture,” and she said “I approve,” that's the end of it. But if the studio says “We are going to put Robert Young in this picture if he will agree,” and she says “I will approve him if he goes in the picture, but if he doesn't go in the picture, then anybody else you secure I will have to approve,” that is different. [579]

Now, she said that she approved Robert Young, as your Honor says, but then she went on to say “If you appoint anybody else, then I have the same right of approval with respect to the person that you appoint as I have with respect to Robert Young.”

The Court: That's right. I think that the parties originally had, on April 29th, a contract, on which each of them were bound in certain ways, as I indicated in one of my earlier memoranda, part of which I still adhere to and part of which I think

I was wrong about. I think after April 29th if Miss Sheridan had said "Forget about the contract, I am going to work for M-G-M," I think they would have brought an action restraining her. And I think if the studio had said "Forget about the contract, we are through with you," I think she might have had some remedy.

I am not too sure about that end of it.

Mr. Knupp: Could I interrupt your Honor right there?

The Court: Yes.

Mr. Knupp: I think as far as the studio is concerned if they would have said that to Miss Sheridan without submitting this role to Robert Young in order to secure his approval, I think under the rule of good faith the studio would have been bound.

The Court: If what?

Mr. Knupp: I think under the rule of good faith unless [580] the studio made a good faith endeavor to secure the services of Mr. Young in this part, I think they would have been bound.

I don't think they would have said, after April 29th, without submitting this script to Robert Young, that they weren't bound by their contract. They were bound, they were bound to submit it.

And I think, also, with respect to that matter, that unless they did make an early, or at least a reasonable attempt to secure his approval, at any time when Miss Sheridan felt that they had had an opportunity to submit the script to Young and secure his approval, and hadn't done it, she could have well said to them "Well, I said that I would approve Robert Young, but you said to me you

didn't know whether he would perform; now I want you to submit this script to Robert Young and see what he is going to say, and I am not going to sit around here waiting to find out."

There never was any discussion, apparently, between the parties. The script was being rewritten, and apparently both people thought it was being rewritten to see what Young was going to say about it.

The Court: Going back to what I said, I think beginning April 29th there was a contract that bound both parties on certain obligations, but there were still things that had to be done, one of which was approval of an actor. [581]

Simultaneously with the contract Miss Sheridan delivered Exhibit 2, which said "I approve Robert Young."

I think you then have another stage of the contract that ran along to about July 11th, in which she was now bound on her approval as long as Young remained in there, but there was a possibility of a defeasance, if I could use that word, or avoidance, in that Young might crawl out on his side. That was something she had no control over. As far as she was concerned, she now had approved Young, he was part of the package deal that had been bought by the studio from the date that she delivered the letter on April 29th and the date she signed the contract. She was stuck with Young, she was bound. But there was a possibility of avoidance on the part of Young or the studio.

Now, Young comes along July 9th, and says "I

have looked at the script, I won't take the part." I think it is a fair interpretation from then on, if nothing else has happened meanwhile,—I am leaving myself an escape hatch—from then on to say that the parties again under the contract had to agree on who this leading man would be, and had to exercise good faith on both their parts in trying to get together on a leading man. Because if they didn't get together on a leading man, then she couldn't be forced to perform.

The thing that is presently bothering me is this: If [582] it is true that Young is in there and approved until about July 11th—looking at paragraph 29: "if, because Artist does not approve any one or more of the items"—under that theory she had approved all of them. If because she didn't approve, "artist does not become obligated." Well, I think the artist was obligated. She couldn't avoid her approval of Young. Young could avoid it, but she couldn't; "and does not render any services pursuant hereto, then the producer is not required to pay her anything."

What were the dates on which she went down and participated in wardrobe fittings? Was that before July 11th?

Mr. Knupp: That was after. Of course, the court says she was bound. But I still am trying to make a point that she was no more bound than the studio was, because she was only bound in the event that Young approved the role. If Young didn't approve the role, and it was true from the very start if Young didn't approve the role, then

Miss Sheridan wasn't bound, because they had to get someone else to perform, and if Young did approve the role the studio was equally bound.

The parties were free in their actions with respect to the same contingency.

Mr. Gang: May I get in the act a moment? I know your Honor is doing a very good job on my side for the moment, and I hate to spoil it. [583]

The Court: Be careful.

Mr. Gang: I do so with some trepidation, except Mr. Knupp has forgotten a few things, which I am sure if reminded of he will concede. One, there is a stipulation that this was a valid contract. And you will remember we forced that stipulation as a condition for our dropping out our general damage action to avoid having the plaintiff get up in court here and say that there wasn't any contract binding the defendant. Your Honor remembers that. That was the condition on which that cause of action was dropped out, to avoid getting in this position.

Secondly, Mr. Knupp is laboring under a misapprehension as to Exhibit 2. This was not something that Miss Sheridan requested; this was something that the defendant requested. In other words, that escape clause is something that the defendant put in so that the defendant, even though Robert Young had been approved, that the defendant, whether Robert Young wanted to do it or not, could put anybody else in, and it wanted that right.

Lastly, and it seems to me most important, as far as that goes, the fact remains that the plaintiff not only was obligated to but did render services. As Mr. Rogell himself testified, as Mr. Sparks did,

there was nothing required of her under that contract which she did not do, until she was fired. [584]

And, as I have said before, the second sentence of paragraph 29 just does not operate unless your Honor rewrites it.

The Court: Of course, if this Robert Young situation had been one like this, supposing Young hadn't been in the package deal, and Miss Sheridan in signing the contract of April 29th had written a letter saying "And I approve Robert Young if you appoint him," then I think that would become sort of a continuing offer on her part, revocable any time before it was acted upon. She could have written a letter the next day and said "Yesterday I approved Robert Young; today I change my mind, I approve Charles Boyer," and again that would have been a continuing offer until the studio would have decided whether they were going to use him. But you don't have that situation. You have a situation where RKO bought what their own executives call a package deal, a deal in which there was a script, an outstanding actor and actress, Sheridan and Young; a producer, a director; a package; Young was part of that package. When Miss Sheridan signed that contract on April 29th, the contract itself provided that she approve the script as it then stood, and if final revisions didn't change it she was going to stand by her approval. But she had not done anything about the directors, she hadn't done anything about the actor. Now, the package deal didn't include a director; the package [585] deal did include an actor. In her letter of April 29th, Exhibit 2, she takes care of

the director situation. "This will confirm that I have approved and hereby approve any of the following individuals to act as the director of 'Carriage Entrance.' "

Was there any evidence who wrote this document?

Mr. Gang: Yes, the evidence is that that was prepared by the defendant.

The Court: By the studio?

Mr. Gang: Yes, and the notations on the upper left-hand corner are notations of the studio lawyers who drafted it.

The Court: It is apparent, therefore, that the studio picked out these three names, and she approved them.

"You shall not be obligated to assign any of these individuals to direct the picture, but any other individuals proposed by you * * * shall be subject to my approval."

Then she goes to the last paragraph:

"This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role * * *. You shall not be obligated to assign him * * *, but any other individual proposed by you * * * shall be subject to my approval."

It seems to me that that is not a continuing offer. It seems to me the parties' minds have met and they have agreed [586] upon Robert Young, and that she has complied with her contract on approval, subject to a defeasance which she may not have known about, and maybe the studio didn't think

about. There is an escape hatch in the letter, but whether they were thinking about that or not you can't tell, because they put the same escape hatch in as to the directors.

Anyhow, subject to a defeasance that Young might say "Well, I am not going to take the part." Well, when he did that, that would open the matter up again.

But I think this is different from a case where Miss Sheridan had made a continuing offer which she might have withdrawn.

I think she approved Young, and from the time of her approval on April 29th until the time that he exercised his right not to act, there was a contract between them to that extent, subject to it being avoided by his conduct.

Now, shake me on that, will you?

Mr. Knupp: Your Honor says he thinks there was a contract. It seems to me that there was a conditional agreement between the parties. I don't think there was any contract here, because both of the parties reserved the right not to perform.

Mr. Gang speaks of the escape hatch, which we put in the contract. But, after all, the escape hatch which caused the difficulty here is the one that Miss Sheridan put [587] in and which was put in for her benefit, that is, the right of approval.

If she had simply said in that contract, "I will approve Robert Young, but you don't have to appoint him and you can appoint somebody else," and it quit there, I would agree with your Honor that then the studio if it couldn't get Robert Young to

perform was obligated to get somebody else in good faith to take the role.

But the studio couldn't go beyond attempting to appoint somebody that Miss Sheridan would approve, and certainly Miss Sheridan never became obligated to perform this contract. There couldn't be any performance under it until you had a leading man, and the last thing required in the selection of a leading man was the approval of Miss Sheridan.

You never had any agreement under which the picture could be produced until there was a leading man who had been definitely approved by Miss Sheridan.

Now, that is the situation. You didn't have a contract where the parties could go ahead and perform, because both of them still were in a situation where they knew that Robert Young was only named provisionally, and that provision was that he should approve and should agree to perform.

The Court: There is nothing in the contract that says that Robert Young shall approve before Miss Sheridan is bound.

Mr. Knupp: No, but the contract does say that they don't [588] have to appoint him, and I think the evidence is clear enough that the reason that was put in is because the contract between Young and RKO expressly required his approval.

If RKO had bound itself to secure the services of Young, which it didn't do under this contract, but which it might have done in this contract with Miss Sheridan, then when she said she approved, and they said nothing about reserving a right, I

would agree that your Honor was entirely correct. But when the parties contracted having a specific situation in contemplation, and both of them knowing that they might not be bound unless those events occurred, namely, that Young approved this contract, or unless somebody else was appointed that Miss Sheridan did approve, then it seems clear to me, if the court please, that the contract—while Mr. Gang says there was an understanding and agreement that they had a valid contract, I am not questioning that, there is no question but what they did have a contract, the only question is as to when the parties became bound to perform their services under the contract—both of them undoubtedly contemplated when they entered into the agreement that a leading man would be appointed, and if Young didn't approve that somebody else would be appointed and that Miss Sheridan would approve such a man. So it seems to me that the court is taking a very limited view of what the provisions of this contract are. [589]

It really isn't a question of a defeasance at all; it is a question very plainly on the face of it, to me, as to whether the parties became bound to perform, and I think that gets back entirely to the question of good faith.

The Court: In other words, if the studio had wanted to use Young, and he had considered, could they have thrown Young into the picture and started a picture without ever requiring anything further from Miss Sheridan?

Mr. Knupp: I don't think there is any question

about it; I think they were bound to try to get Young. But I think if they had gotten Young, that would have been the end of it.

The Court: The point is supposing they had gotten Young and supposing his contract didn't have this clause in it that he could crawl out on, once they had put Young in and started to make a picture, nothing further was required on Miss Sheridan's part, she didn't have to sign anything more.

Mr. Knupp: No. But the studio did have to get Young to perform the part before Miss Sheridan was bound, that is the proposition.

The Court: Now you are getting down to, although you don't call it that, an argument on mutuality, whether one person can be bound by an agreement if the other person isn't bound. But I don't think we are going to get anywhere [590] on a mutuality argument. I haven't considered it so far for the reason that you have got an entirely different kind of a contract. You have a contract, to start with, on April 29th, that does a certain amount of binding, then you have things happen thereafter. True, if you had a contract spelled out in simple terms where one person was bound, and the other one wasn't, you wouldn't have mutuality, and you probably wouldn't have a valid contract. But where a contract binds a person in certain ways, and binds the other fellow in certain ways, and then you have a particular clause that may lack mutuality, I don't think that the lack of mutuality in one clause of a contract or one part of a contract vitiates the contract. It is entirely

possible that Miss Sheridan would have been bound from April 29th by her approval of Young, and yet the studio not be bound until they finally decided whether they were going to use Young or not.

Mr. Knupp: I don't think there is any question of mutuality involved in this situation at all, if the court please. I think the parties were mutually bound. I think the studio was bound to use its best efforts to get Young; I think the evidence shows that it did. I think Miss Sheridan was bound if the studio couldn't get Young, to use good faith in approving somebody that they did appoint.

I don't think there is any lack of mutuality. The parties [591] agreed impliedly, at least. The studio agreed it would use its best efforts to get Young. It didn't say maybe it couldn't but it would use its best efforts, but that is the implication.

Miss Sheridan said to them in good faith, "If you can't get Young after acting in good faith, I will approve somebody or disapprove if you can't get somebody I approve, at least I will exercise good faith, both of us will exercise good faith in trying to get this leading man."

I don't see that there is any mutuality or lack of mutuality if you take into consideration the implied covenants of this agreement, if the court please.

The Court: What services, if any, do you contend that Miss Sheridan rendered before July 11th?

Mr. Gang: Are you speaking to me, your Honor?

The Court: Yes.

Mr. Gang: Let's go even beyond services and take the word "obligated" also, because there are two phrases.

From April 29th on, from the time that she approved the three items on which she had approval, Miss Sheridan was obligated under the contract so that she could not during the period of time from thence on, expiring 15 weeks after July 6th, which was the last date on which her term of employment was to start, she could not have made a commitment with anybody else. She blocked herself out of the market, and her [592] market value was \$150,000 a picture. She was out of the market during that time. And there isn't any question that the reason why the studio got Miss Sheridan to sign Exhibit 2 was to have a commitment, so they could hire writers, go ahead and work and be ready to make a picture. They wouldn't have signed that contract without having her approval on April 29th any more than they would have settled the law suit.

There isn't any question that on April 29th Miss Sheridan was obligated so that she could have been enjoined from a breach of that contract. And nothing has been said here that will in any way vitiate that position.

Secondly, with reference to the rendition of services, she was only required to render services, as distinguished from an obligation, beginning with the term of employment which was the last day it could start, July 6th. From that time on every time she came to the studio at the request of the defendant she was rendering services, and the rec-

ord is quite clear she came numerous times. The services between July 6th and July 11th consisted of talking about the script. As a matter of fact, the very first meeting was about the script, and the discussion at that time was that Miss Sheridan was worried that the defendant in rewriting the script which had been approved by Mr. Young, according to the evidence here, had minimized his part so she was [593] afraid he wouldn't O.K. it. And that is just what happened. So she was rendering services in discussing the script before Mr. Young refused. After Mr. Young refused, she continued to render services in great detail. She talked to the make-up man, she talked to the designer, she spent a day having designs fitted, she did everything that she had to do, in addition to the efforts she was rendering to assist in the finding of a suitable replacement.

So, as far as she is concerned, not only was she obligated, but she did everything that was required of her that she could have been asked to do under the contract.

She wasn't doing it in a vacuum, but under a written agreement under which she was bound.

This is uncontradicted evidence. There isn't any room here for argument about this. This is in the record from the witnesses produced by the defendants themselves.

I submit that unless you rewrite the second sentence of paragraph 29 you just cannot operate on the facts as they are in this record.

Mr. Knupp: If the court please, just one more

thing. Mr. Gang says that Miss Sheridan was obligated from April 29th.

She was no more obligated than the studio was. The studio was obligated to try to get Robert Young into this part, or put somebody else in. And if the studio hadn't exercised some [594] good faith in that endeavor, I have no doubt that Miss Sheridan could have held the studio for damages.

The parties here had the same kind of contract. The obligations on the one side were just the same as on the other. There were certain obligations that weren't spelled out, but the law spells them out by the requirement that good faith be exercised.

I don't think there is any question, if the court please, but just exactly to the same extent and the same way each party was bound under this contract.

Mr. Gang: I hope we haven't confused the distinction between the motion on the counter-claim and the other one.

The Court: No. I have them in mind. I am just thinking, as I told you at the pre-trial. It bothers me whether I am making an easy problem difficult. I want to think about this a little bit.

Do you want to work some time on instructions this evening?

Mr. Knupp: Whatever the court likes.

The Court: Let's take a recess until about a quarter to four. Shall we meet here in court or in chambers, and go over these instructions?

Mr. Knupp: I would like to meet in your chambers, if the court please. It is a little easier, I think.

The Court: The motions will be taken under

submission [595] and maybe we will rule on them and maybe we won't.

Any other motions?

Mr. Gang: No, your Honor.

(A short recess was taken.)

(Whereupon the following proceedings took place in the chambers of the court in the absence of the jury:) [596]

* * *

“Counsel met with the court in chambers in the absence of the jury for the purpose of considering the instructions of the court to the jury. Instructions tendered by the plaintiff and instructions tendered by the court were read and arguments of the parties with respect to such instructions heard by the court and considered. At the conclusion of such hearing the court announced that it would give none of the instructions tendered by the plaintiff except that plaintiff's requested instruction No. 10 would be given as modified by the court and that the court would give none of the instructions requested by defendant except that it would give instruction No. 4 requested by defendant. The court stated to counsel that the court had prepared its own instructions to the jury and delivered said instructions to counsel. Each of such instructions to which objections were made or exceptions taken is identified by the letters set forth in the reporter's transcript of proceedings. The court's instructions were

considered and the arguments of counsel with respect thereto heard and considered and the court requested counsel to make any objections or take any exceptions which counsel had to the court's instructions or to the refusal of the court to give the instructions requested by the parties." [597]

Tuesday, February 6, 1951. 9:30 A.M.

(The following proceedings were had in the chambers of the court, in the absence of the jury:)

The Court: We are assembled here to talk about objections to the instructions which the court has proposed to give. The record already shows the form instructions that the court is going to give, and for the purpose of summary they are the court's instructions: 1, 2, 2-A, 3, 4, 4-A, 5, 6, 6-A, 7 with a correction as previously indicated, 8, 9, 10, 15, 16, 18, 19, 20, and 20-A.

Then we have a series of instructions which for reference I have called the court's A, B, C, and so forth. Now, what do you have to say?

Mr. Knupp: At this time, if the court please, the defendant objects to the giving of the following instructions to the jury, upon the following grounds:

And I have numbered these, Mr. Reporter, so as to indicate the number of my objections.

(1) The court's instruction A, upon the ground that it states an erroneous legal proposition, and upon the ground that the contract of April 29, 1949,

Plaintiff's Exhibit 1, provides that the artist, plaintiff, shall not be required to render any services pursuant to the contract unless and until she has approved the actor who will portray the [669] leading male role in "Carriage Entrance," and that plaintiff never approved the actor who would portray said leading male role, in that the written approval of Robert Young was qualified by the condition that defendant need not assign him to portray the leading male role in the picture, and that any other individual proposed by defendant to portray the leading male role in the picture should be subject to the approval by plaintiff as provided in Article 1 of said agreement; that Robert Young refused to portray the leading male role in the picture and did not portray said role, or ever become the person who would portray said role; that instruction A assumes that Robert Young was approved as the person who would portray the said role and is contrary to the fact; that, in fact, plaintiff never approved any other actor who would portray the leading male role in the picture, and the instruction assumes a fact that is contrary to the evidence. And upon the ground that the plaintiff never became obligated to nor rendered services pursuant to the contract.

(2) Court's instruction B, upon all of the grounds assigned for the objection to court's instruction A, and upon the ground that said instruction assumes that plaintiff did obligate herself to render services under the contract by her approval of Robert Young on April 29, 1949.

(3) Court's instruction G, upon the ground that the instruction fails to take into consideration that entirely [670] apart from paragraph 29 plaintiff never became obligated to render her services under the contract, because she never approved the actor who would portray the leading male role in "Carriage Entrance," and said instruction does not present this essential part of the case.

(4) Court's instruction H-1, upon all of the grounds assigned for the objection to court's instruction A, and upon the further ground that contrary to the fact the jury is thereby instructed that plaintiff on April 29, 1949 approved Robert Young as the actor for the leading male role, in the film play, and as the actor who would portray the leading male role in said film play, and that plaintiff by said approval of Robert Young became bound to render services pursuant to the contract. And upon the further ground that the court thereby instructed the jury that the sole issue to be decided by the jury was, Did the plaintiff render any services to defendant pursuant to the contract and prior to termination on August 17, 1949; and instructed the jury that if the answer to such question was in the affirmative the verdict of the jury must be for plaintiff. And upon the ground that the evidence shows that plaintiff rendered no services pursuant to the contract prior to the refusal of Robert Young to portray the leading male role in the picture, or at any time thereafter. And upon the further ground that the jury is thereby instructed that if plaintiff

rendered [671] any services pursuant to the contract subsequent to April 29, 1949, and prior to August 17, 1949, plaintiff is entitled to recover without regard to whether plaintiff ever approved any actor who would portray the leading male role after Robert Young refused to perform said role, and that such instruction is erroneous under the law and contrary to the provisions of the contract.

(5) Court's instruction J-1, upon all the grounds assigned for the objection to court's instruction A, and upon all of the grounds assigned for the objection to court's instruction H-1.

(6) Court's instruction L, upon the ground that said instruction fails to state that if in good faith defendant proposed an actor to portray the leading male role in the picture, and the plaintiff failed to approve said actor after reasonable opportunity so to do, plaintiff never became obligated to render her services pursuant to the contract and could not recover in the action.

(7) Court's instruction P, upon all of the grounds assigned for the objection to court's instruction A, and upon all of the grounds assigned for the objection to court's instruction H-1.

(8) Court's instruction Q, upon all of the grounds assigned for the objection to court's instruction A, and court's instruction H-1. [672]

(9) Defendant likewise objects to the failure of the court to give the following instructions requested by defendant, upon the following grounds:

Defendant's proposed instruction No. 1, upon the ground that the court failed to instruct the jury that the plaintiff prior to the termination of her employment failed to approve an actor to portray the leading male role in the picture, but on the contrary instructed the jury that the plaintiff had approved Robert Young for such role and thereby became obligated to render her services pursuant to the contract, and that such an instruction embodies an erroneous conclusion of law and an erroneous interpretation and construction of the terms of the agreement between the parties.

(10) Defendant's requested instruction 2, on the ground that under the terms of the contract the approval by plaintiff of Robert Young on April 29th was not and did not obligate plaintiff to render her services under the contract.

(11) Defendant's instruction 5, upon the ground that said instruction is a correct statement of the law, material to the consideration of the issues of fact, and is not covered by any instruction given by the court.

(12) —

The Court: Just a moment. What was that last one?

Mr. Knupp: The last one was 5.

The Court: Read that last point. [673]

(The record was read by the reporter.)

Mr. Knupp: And I would like to add to that: And is a correct construction and interpretation of

the provisions of the contract between the parties.

The Court: Go ahead.

Mr. Knupp: Now, Mr. Reporter, as Nos. 12, 13 and 14, I would like to repeat the same statement with respect to defendant's proposed instructions 6, 7, and 8. Would you just insert in your notes—I suppose it may be assumed—that we have made the same objection to the failure to give defendant's proposed instructions 6, 7 and 8 as the objection which we made to the failure of the court to give defendant's proposed instruction 5.

I suppose the record can show that without us reading it again into the record.

The Court: That's right. I think it is clear enough what your objection is, just as it stands there.

The objections will be each and all denied, overruled, and you have your exception automatically.

Now, Mr. Gang.

Mr. Gang: Mine will be much shorter and simpler. I won't repeat the objections made before, those are in the pre-trial record, having to do with the court's ruling adverse to plaintiff's contentions.

The Court: You incorporate those by reference here? [674]

Mr. Gang: Yes, if your Honor permits.

I will limit myself now to the two main points in which your Honor still differs from me. One is that under the uncontradicted evidence paragraph 29 never became operative, either as to the first sentence or second sentence, because on the uncontradicted facts the plaintiff did approve an actor to

play the leading male role, and did render services.

Next, to the adoption by the court of the position of the defendant that it was not necessary for the defendant to make any unequivocal selection of a named actor to substitute for Robert Young after he became unavailable, and the adoption by the court of the defendant's position that having discussed actors whom the defendant indicated might be satisfactory to defendant, it was thereafter a futile act for defendant to notify plaintiff that it had selected a named actor even though plaintiff had indicated prior thereto that in her opinion any such named actor was not suitable for the part.

And in that regard, I had prepared three questions of fact to be decided by the jury if the court had ruled in accordance with our position, assuming of course that the jury did not find in accordance with the court's instruction that the plaintiff was entitled to a verdict with reference to paragraph 29. And these three questions which would have had to be answered by the jury, if our conception [675] and interpretation of the procedure under the contract had been followed, are the following:

I hand a copy to the court. I gave one to Mr. Knupp yesterday.

(1) Did the defendant make a final designation of a named actor to portray the leading male role in "Carriage Entrance" after Robert Young refused to play the part?

Yes and no is provided.

If your answer is "No" the other questions need not be answered.

(2) Did the defendant, if it did make a final designation of a named actor to portray the leading male role in place of Robert Young, notify plaintiff unequivocally thereof so as to afford plaintiff a reasonable opportunity to approve such named actor?

Yes and no is provided.

If your answer is "No" the next question need not be answered.

(3) If defendant did make a final designation of a named actor to portray the leading male role in "Carriage Entrance" in place of Robert Young and if defendant did notify plaintiff thereof and did afford plaintiff a reasonable opportunity [676] to approve thereof, did defendant make such final designation in good faith?

Yes and no is provided.

The Court: That was included in one of your instructions, very similar instructions.

Mr. Gang: Yes, the gist of it.

Those are the only objections we urge now, in addition to those we urged heretofore.

The Court: The objections are each overruled and denied.

In answer to your instructions, particularly making the request along the line of the three questions that you ask, the court has instructed the jury, and they have in evidence before them the contract and

the letter, and you may argue as to what your interpretation of the contract is and what should have been done. But my instruction that I have given differs from what you have requested in that I have taken the position that the law doesn't require anybody to do an idle act, and because of the conversations between the parties, statements made back and forth, I don't think any further formality was required. However, your exceptions are duly noted.

Anything further?

Mr. Knupp: That is all I have, if the court please.

Mr. Gang: That is all.

The Court: I am going to give plaintiff's instruction 10 [677] with some minor changes, and I am going to insert in line 6 the following:

"The deposition of Howard Hughes was heretofore taken before a notary public by the plaintiff and was thereafter written up and is available to the plaintiff. However, the Federal Rules of Civil Procedure permit the plaintiff to call an officer of a party defendant as an adverse witness under Rule 43(b), and to examine him as upon cross-examination. The fact that a deposition has been taken does not deprive a party of this right. However, where the witness is unavailable, the deposition ordinarily may be used."

Then I will go ahead with the rest of 10 as submitted.

(Thereupon the proceedings were resumed in

open court within the hearing and in the presence of the jury:)

The Clerk: No. 10585-C, Ann Sheridan v. RKO Radio Pictures, further trial.

The Court: The record will show that counsel for both parties are in court, and the jury are present and in their proper places.

Now we are ready to proceed with the argument.

Your estimates, gentlemen, still remain about the same?

Mr. Gang: Shorter. [678]

Mr. Knupp: Yes, I think that is so. I don't think the arguments of both sides will take much more than an hour.

The Court: You may divide your argument, Mr. Gang, as you see fit, and Mr. Knupp may have as much time in toto as you take for your two arguments. Is that satisfactory?

Mr. Gang: Perfectly.

The Court: All right, Mr. Gang.

(Whereupon the case was argued to the jury on behalf of plaintiff and defendant by counsel for the respective parties, which argument was reported by the court reporter, but at the request of counsel was not transcribed.)

The Court: Before I instruct you as to the law, we will take a short recess.

The court again admonishes you that the case has not yet been submitted to you for your decision, so you are not to converse or otherwise communicate among yourselves or with anyone upon any subject touching the merits of the cause, and you are not

to form or express an opinion on the case until it is finally submitted to you for your verdict.

We will take a short recess. The jury may retire. Court will remain in session.

(The following proceedings were had in the absence of the jury:) [679]

The Court: The record will show that the jury is absent.

Have counsel looked over these forms of verdict?

Mr. Knupp: They were just handed to us, if the court please.

The Court: Here, Mr. Gang, you may look at the originals. Don't fill in any names on the originals, though, Mr. Gang.

Counsel, with reference to the instructions, while the argument was proceeding, I have been thinking about this instruction on Section 29. I don't think it makes any difference, in so far as the objections you have heretofore made, but I think I will read the whole of Section 29.

Mr. Knupp: We would make the same objection, if the court please. I don't think the objection went particularly to the fact that the court only proposed to refer to part of it.

The Court: I don't think it will vary your objections. You still have your objections available. I will read the whole of Section 29, and then call the attention of the jury that I have interpreted the words "minimum compensation" to mean \$50,000.

We will take a short recess.

(A recess was taken.) [680]

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: The record will show that the jury is present and in their proper places.

Mr. Gang: So stipulated.

COURT'S INSTRUCTIONS TO JURY

The Court: Members of the jury: You have heard the evidence and the argument. Now it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Ann Sheridan, and the answer thereto of the defendant RKO Radio Pictures, Inc.; and the counter-claim of RKO Radio Pictures, Inc., and the answer of Ann [681] Sheridan thereto. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy.

prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations, stand equal before the law.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his case by a preponderance of the evidence; and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth.

Evidence may be either direct or indirect. [682] Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, even though true, does not itself conclusively establish the fact in question, but which affords an inference or presumption of

the existence of such fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved. A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed, the jury are bound to find in accordance with the presumption.

Unless and until outweighed by evidence to the contrary, the law presumes that private transactions have been fair and regular; that the ordinary course of business has been followed; and that the law has been obeyed.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved. [683]

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case.

But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner [684] in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider

whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who by education and experience has become expert in any art, science or profession, may state his opinions as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; [685] and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

A witness may be discredited or impeached by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony

of that witness or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party. [686]

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The testimony is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after

weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of the one witness.

(COURT'S INSTRUCTION A)

The plaintiff, Ann Sheridan, is a motion picture actress and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. According to the undisputed testimony defendant, RKO, took over from Polan Banks what was termed a "package deal." This included the story and script for "Carriage Entrance," the producer, Banks, the artist for the leading female role, Ann Sheridan, and the actor for the male leading role, Robert Young. RKO took over this package deal in settlement [687] of litigation between itself and Polan Banks. On April 29, 1949, the plaintiff and the defendant entered into the contract which has been received in evidence as Exhibit No. 1, under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled "Carriage Entrance" and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved:

(a) The final shooting script of the screen play for "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for "Carriage Entrance" or the director who would direct the picture. This action presents the question as to whether plaintiff, prior to the termination of her employment by defendant, after approving Robert Young as an actor to portray the leading male role, rendered services to defendant RKO; questions as to the good faith of the respective parties in their dealings concerning the actor for said leading male role after Young's refusal of the part; and the questions presented by defendant's [688] Counter-Claim.

(COURT'S INSTRUCTION B)

On the same day that the contract was entered into, April 29, 1949, plaintiff in writing, Exhibit No. 2, approved Robert Young to portray the leading male role in the picture. This writing was drawn by defendant and also provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defend-

ant submitted the screen play for "Carriage Entrance" to Robert Young about July 7th, 1949, and Young refused on July 11, 1949, to approve such screen play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that after approval by plaintiff of Robert Young, and after plaintiff did obligate herself on April 29, 1949, to render her services in the picture, nevertheless, Young's refusal on July 11th, 1949, to perform the part, made it necessary for the parties to again agree on an actor for the leading male role, before production could start on the picture.

(COURT'S INSTRUCTION C)

The plaintiff alleges in her complaint that the act of [689] the defendant terminating the contract by the written notice of August 17, 1949, was "wrongful, without cause, was taken in bad faith, was arbitrary and unreasonable and constituted a breach of contract by defendant, RKO."

This allegation the defendant denies in its answer.

(COURT'S INSTRUCTION E)

The defendant, RKO, has also filed a counter-claim against the plaintiff, Ann Sheridan, in which it charges her generally with bad faith in connection with the dealings concerning the approval of an actor for the leading male role. About this counter-claim I will instruct you more in detail hereafter.

(COURT'S INSTRUCTION D-1)

Section 29 of the contract, which is Exhibit 1, reads as follows:

Sometimes it is referred to as section 29 and sometimes as paragraph 29:

"Producer shall not be required to use Artist's services hereunder or to complete the production of "Carirage Entrance," and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder."

Let me interpolate at that point that as a matter of law I have construed the contract to mean that the words "minimum compensation" mean the sum of \$50,000.

The section now proceeds: [690]

"However, if, because Artist does not approve any one or more of the items specified in paragraph 1,"

Interpolating, which are the script, director, and the leading male role.

"Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

(COURT'S INSTRUCTION F)

It is conceded by both parties that if plaintiff is entitled to recover, your verdict in her behalf, under the terms of the contract, shall be for the sum of \$50,000, and for the additional sum of \$5,162.42 as

interest on said \$50,000 from August 17, 1949, to date.

(COURT'S INSTRUCTION G)

The case therefore breaks itself down into three parts:

(1) Issues arising under paragraph 29 of the contract.

(2) The general question of the good faith of plaintiff and defendant in their dealings, one with the other in connection with the approval of an actor for the leading male role, and

(3) The issues presented by the counter-claim.

(COURT'S INSTRUCTION I-1)

You are instructed that the contract, paragraph 12, further provided that if the term of the artist's employment began later than June 1, 1949, that the artist agreed to [691] report to producer's studio or elsewhere, when and as directed by the producer during the period (not exceeding, however, one week) prior to the starting date of said term, and to appear, assist and take part in tests, wardrobe fittings, conferences, public interviews, services, still photos and the like, in connection with "Carriage Entrance."

You are further instructed that paragraph 4 of the contract provided that the term of the artist's employment was to start on such date as the producer might specify in writing, but such date, however, was not to be later than July 6, 1949.

In considering whether or not plaintiff rendered

services to the defendant RKO as mentioned in the next instruction, you may consider the provisions of the contract above referred to in reaching your determination.

(COURT'S INSTRUCTION H-1)

The court instructs you that Ann Sheridan, on April 29, 1949, approved Robert Young as the actor for the leading male role in the film play, pursuant to the contract, and that she thereby became bound to render her services to the defendant.

Since there is no issue to be decided by you as to the approval of the script or the director by the plaintiff, Ann Sheridan, the sole issue which you must decide arising under paragraph 29 of the contract is as follows:

(1) Did Ann Sheridan render any services to the [692] defendant RKO, pursuant to the contract and prior to its termination on August 17, 1949?

If you answer this question in the affirmative, then your verdict must be for the plaintiff on her complaint in the sum of \$50,000 plus \$5,162.42 interest.

(COURT'S INSTRUCTION J-1)

If your answer to the foregoing question is in the affirmative and you arrive at a verdict for the plaintiff, then you need consider no further issues in this case.

If your answer to the foregoing question is in the negative and you do not arrive at your verdict, then you must consider the second phase of the case,

namely, the question of the good faith of the parties in their dealings one with the other, in attempting to arrive at an agreement on an actor to play the leading male role in place of Robert Young.

(COURT'S INSTRUCTION K)

In every contract there is an implied covenant of good faith, and fair dealing; and in the contract between the plaintiff and defendant this implied covenant required that defendant should in good faith propose to plaintiff for the leading role in the picture the names of actors who were competent and qualified to portray such role, and with the intent on the part of defendant to assign to the role any one of such actors who was approved by plaintiff; and on the part of plaintiff, the implied covenant was that in refusing to approve any person that defendant proposed plaintiff would [693] act in good faith and would base such refusal upon some reasonable, sensible objection.

(COURT'S INSTRUCTION L)

After Robert Young refused to play the leading male role, it became necessary for the plaintiff, Ann Sheridan, and the defendant, RKO, to agree on a new male lead before the production could continue.

The procedure contemplated by the contract, Exhibit No. 1, and the letter, Exhibit No. 2, which defendant prepared for Miss Sheridan's signature, was as follows:

That if Young was not used by the defendant in the film play, then RKO would propose an actor

for the leading male role and Miss Sheridan would then approve or reject this actor. Under the agreement between the parties she had the right to approve or reject the proposed actor.

In substance, this amounted to simply this: That Ann Sheridan and RKO, under the agreement, had to come to an agreement or a meeting of the minds on the actor for the leading male role.

The plaintiff had no right or voice in the selection of an actor to portray the leading male role in the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent [694] and qualified actor of recognized standing and reputation in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the plaintiff by her statements or conduct plainly indicated that she would not approve such actor if he were assigned to the role.

(COURT'S INSTRUCTION M)

It is not important how or in what manner names of actors for this role were proposed or what formality was used. RKO would not need to make a formal proposal in writing or otherwise, as to the

name of an actor which Miss Sheridan had orally rejected. The law does not require the doing of an idle act.

(COURT'S INSTRUCTION N)

At any rate, the parties never got together on a new actor for the leading male role, and so we are now concerned with whether or not either or both of the parties acted or failed to act in good faith in their dealings.

If you find that defendant, RKO, in its dealings with Ann Sheridan on this matter of filling the leading male role, was motivated by and acted in bad faith, then this would constitute a breach of contract by the defendant and your verdict in such event would be for the plaintiff in the sum of \$50,000 plus interest in the sum of \$5,162.42, and this verdict would follow from your finding of bad faith on the part of the defendant. [695]

(COURT'S INSTRUCTION P)

If you find that Miss Sheridan in her dealings with RKO on this matter of filling the male lead was motivated by and acted in bad faith, then your verdict must be against Miss Sheridan on her complaint and must be a verdict that she take nothing by her complaint, unless you find that she is entitled to your verdict under my previous instructions.

(COURT'S INSTRUCTION Q)

If you find that both parties in their dealings concerning the filling of the leading male role, were

motivated by and were acting in good faith in such dealings, then your verdict must be against Miss Sheridan on her complaint and must provide that she take nothing by that complaint unless she is entitled to recover under my previous instructions.

When I talk about "my previous instructions" I am talking about the instructions concerning section 29 of the contract.

(COURT'S INSTRUCTION R)

Defendant's counter-claim: Defendant RKO has filed a counter-claim and offered proof thereon. It alleges that after the execution of the contract, RKO made preparations for the production of the film play and employed various persons upon the assumption that plaintiff would play the leading female role in the film play.

Defendant RKO alleges that plaintiff Sheridan, arbitrarily, capriciously, unreasonably and without cause or justification refused to approve any actor for the leading male role that was proposed by defendant. [696]

Defendant claims costs, expenses and money expended in the sum of \$72,686.39 and seeks judgment against plaintiff in that amount.

(COURT'S INSTRUCTION S)

I have previously instructed you that every contract contains the implied covenant of good faith and fair dealing.

After Robert Young refused the male lead, Miss Sheridan, under the agreement of the parties, had

the right of approval or disapproval of any actor proposed by defendant for the leading male role.

It would be only in the case of bad faith on the part of the plaintiff, Miss Sheridan, in her dealings with the defendant, that she could be liable on the counter-claim. If, in good faith, she made her rejections of male actors proposed by the defendant, then there is no liability on the plaintiff even though some damage may have been suffered by the defendant.

If, on the other hand, you find bad faith on Miss Sheridan's part in her dealings with the defendant RKO concerning the actor for the leading male role then and in that event only is defendant entitled to a verdict on its counter-claim.

In that event you will determine what amount, not exceeding \$72,686.39, will fairly compensate the defendant for the damage, if any, suffered by the defendant as alleged.

(COURT'S INSTRUCTION T)

Good faith is difficult to define, but essentially it [697] means fair dealing and it concerns the mental attitude of the party involved. It concerns his desires and intentions. A person may be stubborn, arbitrary or dogmatic in his actions in connection with whether or not he should or should not do a certain thing or refrain from doing a certain thing, but such matters are not necessarily actions in bad faith. Bad faith carries a sinister or wrongful connotation, such as doing the unfair or the unjust thing.

Examples may assist you in this matter. If you find, for instance, that Miss Sheridan deliberately refused to approve an actor for the leading male role because she was motivated by the desires and intention that the production of the film play should be stretched out, and that as a result thereof she would receive \$10,000 per week for weeks in excess of the first 15 weeks of production, then any act she did when so motivated was in bad faith.

By the same token, if you should find the defendant RKO, in refusing to propose or approve as an actor for the leading male role any of the ones suggested by Miss Sheridan was motivated by the desire to prevent Miss Sheridan from acting in the film play "Carriage Entrance" and to deprive her of her contract and the compensation thereunder, then any act done by RKO with that motive would be an act in bad faith. Or if you should find that RKO, for instance, had the intention of using Robert Mitchum in the film play, but kept this intention [698] secret until after its notice of termination of contract was sent to Miss Sheridan and then placed Robert Mitchum in the film play, such action by RKO with such motivation would be in bad faith.

During the course of the trial, at a time when the jury was not in the court room, plaintiff requested the court to make an order requiring the defendant to produce Howard Hughes in order that the plaintiff might have an opportunity to question Mr. Hughes as an adverse witness.

The deposition of Howard Hughes was hereto-

fore taken before a notary public by the plaintiff, and was thereafter written up and is available to the plaintiff. However, the Federal Rules of Civil Procedure permit the plaintiff to call an officer of a party defendant as an adverse witness under Rule 43(b), and to examine him as upon cross-examination. The fact that a deposition has been taken does not deprive a party of this right. However, where the witness is unavailable, the deposition ordinarily may be used.

The court granted the request made by the plaintiff and made such an order for the appearance of Mr. Hughes. However, despite this order, defendant has failed to produce Mr. Hughes as a witness. The parties have stipulated that it is a fact that Mr. Hughes is an officer of the defendant, holding the position of Managing Director-Production, and in that capacity is in charge of the production of motion [699] pictures by the defendant. The witnesses, who are or were officers or employees of the defendant, have all testified that Mr. Hughes was their ultimate superior.

When I made the order requiring defendant to produce Mr. Hughes as a witness in order that the plaintiff might question him, I cautioned the defendant that unless Mr. Hughes was produced, I would instruct the jury that they could infer by reason of Mr. Hughes' failure to testify that his testimony would have been adverse to the defendant's case.

Nevertheless, defendant has failed to produce Mr. Hughes. Therefore, in determining this case,

you may consider the fact that Howard Hughes did not take the stand and testify. While Mr. Hughes' failure to testify cannot properly be held to supply any fact not reasonably supported by the evidence in the case, you may infer from his failure to testify that if his testimony was given, it would have been unfavorable to the defendant and favorable to the plaintiff.

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then [700] fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial

consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may [701] become involved, and the juror may later hesitate to recede from an announced position even when shown it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. But bear in mind you are not to reveal to the court or to any person how the jury stand, numerically or otherwise, until you have reached an unanimous verdict.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience.

Four forms of verdict have been prepared. Two of them are verdicts on the complaint, and two of them are verdicts on the counter-claim. I will read the two verdicts on the complaint:

“Verdict on the Complaint

“We, the jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., [702] a Delaware corporation, on the complaint herein, and assess the damages against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) principal, together with interest in the sum of Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$5,162.42), making a total of Fifty-Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$55,162.42).

“Dated: Los Angeles, California, February ..., 1951.

“.....,

“Foreman of the Jury.”

That is in the event you find for the plaintiff on the complaint.

In the event you find for the defendant on the complaint, the verdict reads as follows:

“Verdict on the Complaint

“We, the jury in the above-entitled cause, find in favor of the defendant, RKO Radio Pictures, Inc., a Delaware corporation, and against the plaintiff, Ann Sheridan, on the complaint herein.

“Dated: Los Angeles, California, [703] February .., 1951.

“.....,

“Foreman of the Jury.”

Now,

“Verdict on the Counter-Claim.

“We, the jury in the above-entitled cause, find in favor of the defendant, RKO Radio Pictures, Inc., a Delaware corporation, and against the plaintiff, Ann Sheridan, on the counter-claim herein, and assess the damages against the plaintiff in the sum of Dollars (\$.....).

“Dated: Los Angeles, California, February .., 1951.

“.....,

“Foreman of the Jury.”

And then the alternative

“Verdict on the Counter-Claim.

“We, the jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., a Delaware corporation, on the counter-claim herein.

“Dated: Los Angeles, California, February
.., 1951.

“

“Foreman of the Jury.” [704]

You will take these forms to the jury room and when you have reached unanimous agreement as to your verdict, you will have you foreman fill in, date and sign the form which sets forth the verdict upon which you agree; and then you will return with your verdict to the court room.

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Will counsel approach the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

The Court: Mr. Knupp?

Mr. Knupp: At this time, if the court please, the defendant would like to object to the instructions given by the court as to each and every instruction indicated by the record heretofore prepared, and upon all the grounds which have been indicated in that record.

I would like, also, at this time, if the court please, to object to the instruction which was given with respect to the inference to be drawn from the testi-

mony of Mr. Hughes, the failure of Mr. Hughes to testify, on the ground that it is not a correct statement of the law. [705]

I don't understand that I have precluded myself from that.

The Court: You didn't object to it in there, but you have a right to object to it now. Except the purpose of your objection now is to permit the court to correct any error that may have dropped into the instructions.

In what way do you contend that is error?

Mr. Knupp: I contend, if the court please, that the instruction with respect to the fact that the court had ordered the defendant to produce Mr. Hughes in the court room is prejudicial. And, also, the fact that the court had instructed the jury that it was entitled to draw an inference from his failure to appear that his testimony would be adverse.

The Court: I think that was a very reasonable penalty, and I think the instruction is proper. Objection overruled.

And your other objections are overruled.

Mr. Gang?

Mr. Gang: I will save the time of the court by merely asking that the objections made in chambers this morning be deemed to have been made at this time.

The Court: They may be.

Mr. Knupp: That is the force of what I understand to be the objections that we are both of us now making.

The Court: That's right. [706]

They will be overruled.

(Whereupon the proceedings were resumed in open court within the hearing of the jury as follows:)

The Court: Mr. Clerk, swear the bailiff.

(Whereupon the bailiff was sworn by the clerk.)

The Court: The jury may retire.

If the jury desires the exhibits, you may send down for them and they will be sent up.

(Whereupon the jury retired from the court room and the following proceedings were had in the absence of the jury:)

The Court: The record will show that the jury has withdrawn.

May the clerk in or out of court swear the other matron when she shows up to assist with the jury?

Mr. Gang: So stipulated.

Mr. Knupp: Oh, yes, if the court please.

The Court: I take it it is stipulated that if the jury wants the exhibits that they may be sent up to the jury?

Mr. Gang: So stipulated.

Mr. Knupp: So stipulated.

The Court: Will counsel go over them with the clerk so that there will be no dispute as to what are the exhibits?

Mr. Gang: There isn't any dispute, as far as I am concerned. [707]

The Court: Were there any, Mr. Clerk, that were marked for identification?

The Clerk: Yes.

Mr. Gang: Yes, on that offer of proof. They should be withdrawn from the jury.

The Court: What I want you both to do is to go over them with the clerk and lay aside the exhibits that may go up to the jury, so that if they are sent for and go up to the jury room there will be no dispute but what the ones that are properly in evidence were sent up to the jury room.

Anything further?

Mr. Knupp: Nothing, if the court please.

The Court: Counsel, I suppose, will share equally the cost of feeding this jury of 12 people?

Mr. Knupp: Is there any way of getting any information in advance of how much they will eat?

The Court: All I can say is it is a \$50,000 case, and their bill will be high.

Mr. Knupp: I don't know. If they order steaks it will exhaust most of it.

Yes, if the court please, counsel I think will stipulate to that effect.

The Court: Counsel need not remain in attendance as long as we can reach you within cab time from your office.

Of course, your office is a little further [708] away.

Mr. Gang: With the freeway we are just as close as Mr. Knupp. Fifteen minutes.

Mr. Knupp: That is the way Mr. Gang drives. The way I drive it would take half an hour.

The Court: I guess it is satisfactory to send the

jury to lunch whenever they want to go, to leave it up to them?

Mr. Gang: Yes.

The Court: Anything further?

Mr. Knupp: Nothing, if the court please.

(Whereupon a recess was taken until 2:45 o'clock p.m., when the following proceedings were had in the absence of the jury:)

The Court: The record will show that in the Sheridan case counsel are present and the jury is absent.

I have a note from the jury reading as follows:
I will file it with the clerk.

“Your Honor: We would like to have you further read to the jury that part of your charge relating to verdict or verdicts we are to sign.

“/s/ THEODORE C. HINCKLEY,
“Foreman.”

There were four verdicts handed to them, which were in sets of two. One was a verdict on the plaintiff's complaint.

By the way, do you want to proceed without Mr. Knupp? [709]

Mr. Jeffers: Yes, your Honor.

The Court: One was a verdict on the complaint; a verdict for the plaintiff and a verdict for the defendant. Then the other two verdicts were on the counter-claim; a verdict for the defendant, and a verdict for the plaintiff. Obviously they should be

told that they are in sets of two, and if they arrive at one verdict on the complaint they need not sign the other verdict on the complaint; and if they arrive at one verdict on the counter-claim, they need not arrive at the other verdict on the counter-claim.

The only other question in my mind is this: If they arrive at a verdict for the plaintiff on the complaint, does that or does that not dispose of the counter-claim?

Mr. Gang: Certainly it does, your Honor. If they find for the plaintiff on the complaint, then they must necessarily find against the defendant on the counter-claim.

The Court: Is that your view?

Mr. Jeffers: I would like just a moment to think that over. I would like Mr. Gang to express his opinions a little further on that.

Mr. Gang: Yes. In order for the jury to find for the plaintiff, they must find she performed the contract and the defendant breached it. If the defendant breached the contract, they are not entitled to recover on the counter-claim.

The Court: That's logical. I think one of Mr. Knupp's [710] instructions, as a matter of fact, had that in it.

Furthermore, a counter-claim is something that diminishes or defeats plaintiff's recovery. If they find for the plaintiff, that means that the defendant broke the contract, therefore if the defendant broke the contract any damage that defendant suffered flowed from his own breach.

Therefore I will advise the jury that as to these

two verdicts, that they are in sets of two, but that if they reach a verdict for the plaintiff on the complaint, that disposes of their work.

Do we have them bring in a verdict, then, for the plaintiff on the counter-claim?

Mr. Gang: I think they must. That follows.

The Court: If they reach a verdict for the defendant on the complaint, then they must still consider the two verdicts on the counter-claim. All right. Bring the jury down.

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: Let the record show that the jury are present and in their places.

Mr. Gang: So stipulated.

Mr. Jeffers: So stipulated.

The Court: I have the note which the foreman of the jury sent to the court requesting further instructions or [711] rereading of the instructions concerning the verdict, what verdict you should sign.

It may be that I didn't instruct you as fully as I should have in that respect.

The blank verdicts that were given you were in two sets. There was one set on the complaint, and there was another set on the counter-claim. Now, first as to the set on the complaint. If you find for the plaintiff on the complaint, you don't need to sign the other member of that set as to the defendant, because the signing of one eliminates the other on the complaint.

The next point is this: This is an action for

breach of a contract by the plaintiff, plaintiff sues for breach of contract. If you find for the plaintiff on the complaint and decide to sign the verdict for the plaintiff on the suit on the complaint, that means you have found that the defendant breached the contract, and that is the end of the case as far as the counter-claim is concerned, because if the defendant broke the contract then any damage that the defendant claims to have suffered flowed from his own breach and not a breach by the plaintiff. If, on the other hand, you find, in your consideration of the complaint, that the defendant is entitled to a verdict, namely, that the defendant did not break the contract, then you must go to the counter-claim and render a verdict one way or the other on [712] the two verdicts that comprise the set on the counter-claim.

Do I make myself clear on this?

Foreman of the Jury: In so far as the foreman is concerned, you have, your Honor. It is just a question if the jurors understand it.

The Court: Let me go further.

If your verdict is for the plaintiff on the issues of the complaint, then the court will instruct you that there is no way in which the defendant could recover on the counter-claim. So to clean the record up in proper shape you should in that instance sign the verdict, one of the two verdicts on the counter-claim, in favor of Miss Sheridan, which would dispose of the whole matter.

On the other hand, if your verdict on the complaint is for the defendant, then you must go to the

counter-claim and must pass upon the issues raised by the counter-claim and must sign one or the other of the verdicts as you see fit.

If you should find for the defendant on the complaint, that does not determine which way you decide on the counter-claim, because the counter-claim then becomes a sort of a separate law suit which you must decide.

Do I make myself clear on that?

If you find for the defendant on the complaint, all you have found is that the defendant did not break the contract, [713] and you then go to the counter-claim and see whether or not the defendant is entitled to recover on his counter-claim. But if, on the other hand, you find for the plaintiff on the complaint and bring in a verdict for her, then you have found that the defendant broke the contract, and then by that very finding you have determined that the defendant cannot recover on his counter-claim, and so find.

Is that statement clear to counsel?

Mr. Gang: Yes, your Honor.

Mr. Jeffers: Yes, your Honor.

The Court: No objection to that?

Mr. Gang: None.

Mr. Jeffers: None.

The Court: Does that answer your question?

Foreman of the Jury: That answers it.

The Court: The jury may retire.

(Whereupon the jury retired from the court room and the following proceedings were had in the absence of the jury:)

The Court: The record will show the notes from the jury, one sending for the exhibits, and the other asking for instructions.

(Whereupon court was recessed until the return of the jury, when the following proceedings were had:)

The Court: The record will show that the jury are present [714] and in their proper places, and counsel are present in court.

Mr. Gang: So stipulated.

Mr. Jeffers: So stipulated.

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Jury: We have.

The Court: Hand the verdict to the bailiff.

(Verdict passed to the court.)

The Court: Read the verdict, Mr. Clerk.

The Clerk: Title of the court and cause.

“Verdict on the Complaint

“We, the jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., a Delaware corporation, on the complaint herein, and assess the damages against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) principal, together with interest in the sum of Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$5,162.42), making a total of Fifty-Five

Thousand One Hundred and Sixty-Two Dollars and Forty-Two cents (\$55,162.42). [715]

“Dated: Los Angeles, California, February 6th, 1951.

“THEODORE C. HINCKLEY,
“Foreman of the Jury.”

Is the verdict which I have just read the verdict of each one of you ladies and gentlemen?

(Assent.)

The Court: Do either counsel care to poll the jury?

Mr. Jeffers: No, your Honor.

The Court: Before the jury is discharged, there has been no verdict returned on the counter-claim. Is there any necessity to ask the jury to go back, in view of the court's statement to them?

Mr. Gang: I don't believe so, your Honor. I think it follows as a matter of law that the judgment on the counter-claim must be against the defendant.

Mr. Jeffers: The defendant is perfectly satisfied, your Honor.

The Court: I think that counsel is correct, that the verdict on the complaint is sufficient and there is no need to ask the jury to return a verdict on the counter-claim, for the reason that by their finding of the verdict on the complaint they have found that the defendant breached the contract; therefore, as a matter of law, any damage the defendant claims to have suffered under its allegations [716] of the counter-claim was caused by its conduct and

not the conduct of plaintiff. In view of counsel's statement representing the defendant that he does not desire the jury to be asked to return to consider the matter of a verdict on the counter-claim, I will let the matter stand on the verdict that has been returned.

The clerk will record the verdict.

The Clerk: In that event wouldn't you have to order a judgment on the counter-claim? [717]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of April, A.D. 1951.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed March 4, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 150, inclusive, contain the original Amended Complaint for Damages for Breach of Contract; Motion to Dismiss and Motion to Strike; Answer and Counterclaim; Answer to Counterclaim; Order for Pre-trial Hearing, etc.; Memorandum for Counsel; Memorandum to Counsel re Pre-Trial Order; Pre-Trial Stipulation and Order of the Court; Plaintiff's Requested Instructions; Jury Instructions Requested by Defendant; Affidavit of Vito Rotunno; Subpoena to Howard Hughes and Return Thereon; Plaintiff's Requested Additional Instructions; Plaintiff's Revised and Additional Instructions Dated 2-4-51; Verdict on the Complaint; Judgment; Defendant's and Plaintiff's Notices of Appeal; Stipulation Designating Record on Appeal and Order Extending Time for Filing the Record and Docketing Appeal and a full, true and correct copy of minute order entered February 21, 1950, which, together with original plaintiff's Exhibits 1 to 22, inclusive; original defendant's exhibits A to E, inclusive, and original reporter's transcripts of proceedings on December 4 and 21, 1950; January 11, 29, 30 and 31, 1951; February 1, 2, 5 and 6, 1951, transmitted herewith, constitute the record on the appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.40, one-half of which has been paid by each of the parties.

Witness my hand and the seal of said District Court this 10th day of May, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12927. United States Court of Appeals for the Ninth Circuit. RKO Radio Pictures, Inc., a Corporation, Appellant, vs. Ann Sheridan, Appellee, and Ann Sheridan, Appellant, vs. RKO Radio Pictures, Inc., a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed May 14, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12927

ANN SHERIDAN,

Appellant and Appellee,

vs.

RKO RADIO PICTURES, INC.,

Appellant and Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RKO RADIO PICTURES,
INC., INTENDS TO RELY ON APPEAL

Appellant, RKO Radio Pictures, Inc., on its appeal from the judgment entered in the above-entitled action, intends to rely on the following points:

1. The court erred in giving the following instructions to the jury: Each of the Instructions designated in the record as Court's Instructions A, B G, H-1, J-1, L, P, and V for the reasons set forth in the objections of appellant, RKO Radio Pictures, Inc., to said instructions, and in overruling the objections of said appellant to said instructions.

2. The court erred in giving plaintiff's instruction 10 as modified by the court, upon the ground that said instruction embodies an erroneous statement of law.

3. The court erred in refusing to give the instructions No. 1, 2, 5, 6, 7, and 8 tendered by the appellant, RKO Radio Pictures, Inc., for the reasons set forth in appellant's objections to the refusal to give said instructions as set forth in the record.

4. The court erred in instructing the jury, as a fact, that Robert Young was approved by the plaintiff as the person who would portray the leading male role in the film play "Carriage Entrance" and that such instruction is contrary to the fact and said plaintiff never approved any actor who would portray the leading male role in said film play.

5. The court erred in instructing the jury, as a fact, that the approval by plaintiff of Robert Young on April 29, 1949, as the actor who would portray the leading male role in the picture obligated plaintiff to render her services under the contract.

6. The court erred in instructing the jury that the approval on April 29, 1949, by plaintiff of Robert Young as the actor to portray the leading male role in the film play was an approval by plaintiff of the actor who would portray the leading male role in the film play under the terms of the contract of April 29, 1949 (Plaintiff's Exhibit 1), and that plaintiff thereby became bound to render services under the contract.

7. The court erred in instructing the jury that the sole issue to be decided by the jury was, did the plaintiff render any services pursuant to the contract and prior to termination on August 17, 1949, and in instructing the jury, if its answer to such question was in the affirmative, that the jury must render a verdict for plaintiff.

8. The court erred in instructing the jury that if the jury determined that plaintiff rendered any

services pursuant to the contract and prior to termination on August 17, 1949, it need not consider other issues in the case.

9. The court erred in refusing to instruct the jury as requested by defendant that plaintiff prior to the termination of her employment on August 17, 1949, had failed to approve any actor who would portray the leading male role in the film play.

10. The court erred in refusing to instruct the jury as requested by the defendant that the approval by plaintiff on April 29, 1949, of Robert Young to portray the leading male role in the film play did not obligate plaintiff to render her services pursuant to the contract, and the refusal of Young to portray the role made it necessary that defendant should propose and plaintiff should approve some other person before plaintiff became obligated to render her services pursuant to the contract.

11. The court erred in refusing to instruct the jury, as requested by the defendant, that if defendant did in good faith, and after Robert Young refused to portray the role, propose the name of another person to portray such role and the plaintiff refused to approve such person, the defendant was entitled to terminate the contract without payment of any compensation to plaintiff.

12. The court erred in refusing to instruct the jury, as requested by the defendant, that if, after Robert Young refused to portray the leading role in the film play, the defendant did in good faith

propose another person to portray and the plaintiff did not approve such person, the plaintiff never became obligated to render any services pursuant to the contract.

Respectfully submitted,

MITCHELL, SILBERBERG &

KNUPP, and

GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Appellant and Appellee RKO Radio
Pictures, Inc.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 14, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT ANN SHERIDAN INTENDS
TO RELY ON APPEAL

Appellant Ann Sheridan on her appeal from the judgment entered in the above-entitled action, intends to rely on the following points:

1. The trial court erred in holding and declaring that the first sentence of Paragraph 29 of the contract which is plaintiff's Exhibit 1 in evidence (reading as follows):

“Producer shall not be required to use Artist's services hereunder or to complete the production of “Carriage Entrance,” and shall be deemed to

have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder.”

became operative thereby limiting appellant Ann Sheridan's recovery to the sum of \$50,000.00.

2. The trial court erred in failing and refusing to permit appellant Ann Sheridan to introduce parol evidence as to the meaning of the phrase “minimum compensation” in the first sentence of Paragraph 29 of said contract if said first sentence was operative.

3. The trial court erred in failing and refusing to permit appellant Ann Sheridan to offer evidence as to the damages suffered by said appellant as a result of the breach of contract by appellee RKO Radio Pictures, Inc., over and above the sum of \$50,000.00.

4. The trial court erred in failing and refusing to give to the jury appellant Ann Sheridan's requested instructions No. 6, No. 6 (alternate) and No. 6 (second alternate), all dealing with the measure of damages.

5. The trial court erred in interpreting the contract between the parties (which contract is plaintiff's Exhibit 1 in evidence) so as to limit the damages awarded to appellant Ann Sheridan for appellee RKO Radio Pictures, Inc., breach of said contract to the sum of \$50,000.00.

6. The trial court erred in failing and refusing to permit the jury to render a verdict in favor of appellant Ann Sheridan and against appellee RKO

Radio Pictures, Inc., for said appellee's breach of contract, in a sum in excess of \$50,000.00.

Respectfully submitted,

GANG, KOPP & TYRE, and
MARTIN GANG,

By /s/ MARTIN GANG,
Attorneys for Appellant and Appellee Ann Sheridan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 14, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION DESIGNATING PORTIONS
OF RECORD TO BE PRINTED

Appellant and appellee, Ann Sheridan, and appellant and appellee, RKO Radio Pictures, Inc., hereby stipulate and agree that the following portions of the record are material and necessary for the consideration of the points upon which the parties intend to rely upon appeal and that such portions of the record and no other shall be printed:

Clerk's Transcript of Record

(References are to pages of said transcript)

1. Amended complaint. P. 2 to 13 incl.
2. Answer and counterclaim—omitting Exhibit "A" which is identical with plaintiff's Exhibit "1." in evidence. P. 27 to 38, incl.
3. Answer to counterclaim. P. 55 to 57, incl.

4. Memorandum for counsel filed December 13, 1950. P. 60 to 64.

5. Memorandum for counsel on pre-trial order filed January 18, 1951. P. 65 to 67, incl.

6. Pre-trial stipulation and order dated January 30, 1951. P. 68 to 75, incl.

7. Instructions to the jury requested by plaintiff. No. 6, p. 85 to 86. No. 6 alternate, p. 87 to 89. No. 6 second alternate, p. 90 to 91.

8. Instructions to the jury requested by defendant. P. 98 to 110.

9. Affidavit of Vito Rotunno. P. 111 to 117.

10. Return of service of U. S. Marshal. P. 119.

11. Verdict of the jury. P. 141.

12. The Judgment. P. 142 to 143.

13. Notice of appeal filed by plaintiff. P. 145.

14. Notice of appeal filed by defendant. P. 144.

15. Stipulation of the parties designating record on appeal. P. 147 to 149.

16. Order of April 3, 1951, extending time to file record and docket appeal. P. 150.

Reporter's Transcript of Record

The following portions of the reporter's transcript of proceedings:

P. 2, lines 3 to 7, incl.

P. 5, line 16, to p. 6, line 3.

After line 3, p. 6, insert the following:

"Therupon counsel for the rspective parties made opening statements to the jury and upon the conclusion thereof the following proceedings were had":

P. 28, line 1 to p. 277, line 4, incl.

P. 285, line 1, to p. 527, line 14, incl.

P. 538, line 1, to p. 596, line 6.

After p. 596, line 6, insert the following:

“Counsel met with the court in chambers in the absence of the jury for the purpose of considering the instructions of the court to the jury. Instructions tendered by the plaintiff and instructions tendered by the court were read and arguments of the parties with respect to such instructions heard by the court and considered. At the conclusion of such hearing the court announced that it would give none of the instructions tendered by the plaintiff except that plaintiff’s requested instruction No. 10 would be given as modified by the court and that the court would give none of the instructions requested by defendant except that it would give instruction No. 4 requested by defendant. The court stated to counsel that the court had prepared its own instructions to the jury and delivered said instructions to counsel. Each of such instructions to which objections were made or exceptions taken is identified by the letter set forth in the reporter’s transcript of proceedings. The court’s instructions were considered and the arguments of counsel with respect thereto heard and considered and the court requested counsel to make any objections or take any exceptions which counsel had to the court’s instructions or to the refusal of the court to give the instructions requested by the parties.”

Here insert in the printed record the following

from the reporter's transcript of the proceedings.

P. 669, line 1, to p. 717, line 10.

Exhibits

In order to reduce the size of the printed record and minimize the cost thereof, and due to the fact that the following exhibits are lengthy and only relatively short portions thereof are material to consideration of the points upon which the parties intend to rely upon this appeal, none of the following exhibits shall be printed in the record and each party may print in an appendix to his brief such excerpts or portions thereof as he deems material to any point upon which he relies.

Plaintiff's Exhibit 1.

Plaintiff's Exhibit 3 for Identification.

Plaintiff's Exhibit 4 for Identification.

Plaintiff's Exhibit 5 for Identification.

Plaintiff's Exhibit 11.

Plaintiff's Exhibits 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.

Defendant's Exhibits D, E.

The following exhibits were read to the jury and are set out in the portion of the record designated to be printed and need not be printed separately:

Plaintiff's Exhibits 2, 6, 7, 8, 9, 10.

Defendant's Exhibits A, B, C.

GANG, KOPP & TYRE, and
MARTIN GANG,

By /s/ MARTIN GANG,

Attorneys for Appellant and Appellee Ann Sheridan.

MITCHELL, SILBERBERG &
KNUPP, and
GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Appellant and Appellee RKO Radio
Pictures, Inc.

[Endorsed]: Filed May 14, 1951.

[Title of Court of Appeals and Cause.]

ORDER RE PRINTING OF EXHIBITS IN
RECORD ON APPEAL

It appearing to the court from the stipulation of the parties filed herein that the following exhibits received upon the trial of the case, to wit: Plaintiff's Exhibits 1, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, and defendant's Exhibits D and E, are lengthy and that only short portions thereof are or may be material to a consideration of the points intended to be relied upon on this appeal,

It Is Ordered that said exhibits need not be printed as part of the printed record and that either party shall be entitled to print in an appendix to his brief such portions of either or any of said exhibits as such party may consider material to any point relied upon by him.

It further appearing to the court from said stipulation that each of the following exhibits received upon the trial of said case, to wit: Plaintiff's Exhibits 2, 6, 7, 8, 9 and 10, and defendant's Exhibits A, B and C, were read to the jury and appear in

full in the portion of the Reporter's Transcript of Proceedings designated to be included in the printed record;

It Is Further Ordered that none of said Exhibits shall be printed separately from the copy thereof set forth in said printed record.

Dated: May 15, 1951.

/s/ WILLIAM HEALY,

/s/ WM. E. ORR,

/s/ WALTER L. POPE,

Judges U.S. Court of Appeals
for the Ninth Circuit.

[Endorsed]. Filed May 23, 1951.



